91-502
(1)

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PATRICIA M. ECKERT, G. MITCHELL WILK, JOHN B. OHANIAN, DANIEL WM. FESSLER, NORMAN D. SHUMWAY, NEAL J. SHULMAN, and WILLIAM R. SCHULTE,
Petitioners,

vs.

FEDERAL EXPRESS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 23, 1991

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Whether the Airline Deregulation Act of 1978, as amended, 49 U.S.C. App. § 1305(a)(1), which prohibits state regulation "relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation," preempts the State of California from engaging in the economic regulation of Federal Express Corporation's purely intrastate transportation of packages that are transported exclusively by truck and at no time by air.

PARTIES

Appellant in the United States Court of Appeals for the Ninth Circuit was Federal Express Corporation.

Appellees were the Public Utilities Commission of the State of California ("CPUC") and, in their official capacities, Stanley W. Hulett, Donald Vial, Frederick R. Duda, John B. Ohanian, and G. Mitchell Wilk, Commissioners of the CPUC, Victor Weisser, Executive Director of the CPUC, and Norman Kelley, Director of the Transportation Division of the CPUC.

In accordance with Fed.R.Civ.P. 25(d), Fed.R.App.P. 43(c)(1) and U.S.S.Ct. R. 35.3, the names of the successors to those officials who no longer hold office have been substituted in the caption.

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The Public Utilities Commission of the State of California, its Commissioners, its Executive Director and the Director of its Transportation Division (hereinafter collectively "CPUC" or "California") respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 25, 1991.

OPINIONS BELOW

The majority and dissenting opinions of the Ninth Circuit are reported at *Federal Express Corp. v. Pub. Util. Comm'n of California*, 936 F.2d 1075 (9th Cir. 1991), and are reproduced in

the Appendix, A1-12.[1] The opinions of the District Court are reported at *Federal Express Corp. v. Pub. Util. Comm'n of California*, 716 F.Supp 1299 (N.D.Cal. 1989), and *Federal Express Corp. v. Pub. Util. Comm'n of California*, 723 F.Supp 1379 (N.D.Cal. 1989), and are reproduced in the Appendix, B1-13 and C1-10, respectively.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 25, 1991, with a dissenting opinion filed on June 27, 1991. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Airline Deregulation Act of 1978, as amended, 49 U.S.C. App. § 1305(a)(1), provides:

> Except as provided in paragraph (2) of this subsection [which is not applicable here], no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Other relevant constitutional and statutory provisions and regulations are set forth in Appendix, D1-E201.

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[1] As herein used, numerals preceded by letters refer to page numbers in the appendix to this petition.

STATEMENT OF THE CASE

Federal Express Corporation ("Federal Express"), a nationwide air package express delivery service, is one of the largest trucking companies in the State of California. It operates its air transportation business pursuant to a grant of authority under the Federal Aviation Act, 49 U.S.C. App. § 1371. It is therefore an "air carrier having authority . . . to provide air transportation" within the meaning of 49 U.S.C. App. § 1305(a)(1)—at least with respect to its air transportation activities.

A significant portion of Federal Express's business, however, involves the transportation of packages originating at and destined for locations within California which move solely by truck and neither leave the state nor see the inside of an airplane. It is this portion of Federal Express's business that is involved in this case.

Federal Express's California ground fleet consists of more than 2,600 trucks, vans and tractor-trailers. It operates 39 motor carrier repair and maintenance shops throughout the state, and its vehicles are also repaired and maintained at ten truck service centers operated by independent contractors. F5. Federal Express's intrastate motor carrier operations in California are substantial, and each year the company delivers hundreds of thousands of purely intrastate California packages which move exclusively by truck. F6. In conducting its intrastate trucking business, Federal Express competes directly with numerous other intrastate motor carriers which are subject to state regulation.

Federal Express's company policy encourages the exclusive use of the less costly truck transportation mode over air transportation whenever feasible. Thus package sorters in Los Angeles and the San Francisco Bay Area are instructed to segregate and set aside packages for regional delivery solely by truck, *e.g.*, in the Los Angeles Basin or between Oakland, Federal Express's western hub, and other Northern California cities such as Santa Rosa, Sacramento, San Jose and San Francisco. F6; F4. Additionally, five large Federal Express trucks transport packages, many of which are purely intrastate in character, between California's two principal population centers—Los Angeles and the San Francisco Bay Area—on a daily basis pursuant to a fixed schedule. F2-3.

Packages for second-day delivery are also transported entirely on the ground. F3. Recently, Federal Express announced its intention to expand its California intrastate trucking business from small packages to freight shipments of any size or weight. *See* Note 7, *infra*.

The CPUC is a state agency established pursuant to the Constitution and Laws of the State of California. Cal. Const., Art. XII, §§ 1-9. It is responsible for regulating various aspects of the intrastate motor carrier transportation of packages, freight and property, including licensing, insurance, rates and safety. Cal. Const., Art. XII, § 4; Cal. Pub. Util. Code §§ 1062, 3502.[2] Its flexible and pro-competitive economic regulatory program is a model for other states. *See Re Regulation of General Freight Transportation by Truck*, 33 Cal. P.U.C.2d 333 (1989), *modified*, 35 Cal.P.U.C.2d 307, (1990); E1-201. Three primary goals of the CPUC's regulatory program are to promote fair competition among intrastate motor carriers, to prohibit discrimination and to ensure public safety. E45. To support its statewide regulatory and safety program for trucks, the CPUC imposes quarterly fees on carriers based upon their California gross operating receipts. Cal. Pub. Util. Code § 5003.1. More than 20,000 intrastate motor carriers in California pay such fees. F12-16.

The CPUC has regulated the portion of Federal Express's business which is conducted purely intrastate and solely by truck long after the enactment of the Airline Deregulation Act. Since 1984, Federal Express has held commercial trucking licenses from the CPUC.[3] Consistent with its flexible rate and liberal variance policies, the CPUC has granted Federal Express permis-

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[2] As indicated by the Ninth Circuit, 936 F.2d at 1078; A5, this case does not place in issue the CPUC's authority to regulate safety. The CPUC interprets the Ninth Circuit's decision as allowing it to grant operating authority, to adopt safety regulations including the specification of driver, equipment-listing, inspection, insurance and other safety-related requirements, to revoke operating authority for violation, and to collect fees to underwrite its safety program.

[3] Federal Express possesses two types of authority from the CPUC—a highway common carrier certificate registered to a wholly-owned subsid-

sion to charge the same rates for its intrastate ground movements as it charges for its interstate air movements. F7-9; F11-12. From 1985 to 1987, the company remitted quarterly fees to the CPUC based on estimates of gross operating revenues from its truck-only California intrastate traffic. *Id.* Such payments have been held in abeyance during the pendency of this action.

On September 23, 1987, Federal Express filed suit in the United States District Court for the Northern District of California under 28 U.S.C. §§ 1331, 1332, 1337, 2201 and 2202, seeking injunctive and declaratory relief from the CPUC's economic regulation of its truck-only intrastate motor carrier operations. It alleged that the CPUC's regulation was preempted by 49 U.S.C. App. § 1305(a)(1) and must therefore fall under the Supremacy Clause (U.S. Const., Art. VI, cl. 2). It also alleged that the CPUC's regulation constituted an impermissible burden on interstate commerce under the Commerce Clause (U.S. Const., Art. I, § 8, cl. 3).

On cross-motions for summary judgment, the CPUC prevailed on both the preemption claim (*Federal Express Corp. v. Pub. Util. Comm'n of California*, 716 F.2d 1299 (N.D.Cal. 1989)) and the Commerce Clause claim (*Federal Express Corp. v. Pub. Util. Comm'n of California*, 723 F.2d 1379 (N.D.Cal. 1989)).

On June 25, 1991, the United States Court of Appeals for the Ninth Circuit ruled in a split decision that California's economic regulation of Federal Express's purely intrastate trucking operations is preempted under § 1305(a)(1) and reversed the judgment of the District Court. *Federal Express Corp. v. Pub. Util. Comm'n of California*, 936 F.2d 1075 (9th Cir. 1991).

This petition follows.

REASONS FOR ALLOWANCE OF THE WRIT

The Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. The Ninth Circuit has concluded that the Airline Deregulation Act of

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iary, Federal Express Logistics, Inc., and a highway contract carrier permit registered to Federal Express Corporation. F5.

1978, as amended, 49 U.S.C. App. § 1305(a)(1), preempts all state economic regulation of the "rates, routes, or services of any air carrier," whether or not those "rates, routes, or services" have anything to do with the provision of air transportation. Under the Ninth Circuit's rationale, once a party becomes an "air carrier" within the meaning of § 1305(a)(1), its activities having little or no relationship to air transportation become immune from state economic regulation.[4]

California, on the other hand, contends that the phrase "rates, routes, or services of any air carrier" refers solely to activities related to the provision of air transportation. Based on California's concessions that it will not regulate movements which either leave the state or are conducted wholly or partly by airplane, the dissent characterizes this as "an easy case" in California's favor. 936 F.2d at 1080; A8. To date, the Court has not considered the preemptive reach of § 1305(a)(1).[5]

The Ninth Circuit's facial invalidation of California's economic regulation of Federal Express's intrastate trucking operations seriously misconstrues both the Congressional intent underlying

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[4] As noted by the dissent below, "if Federal Express diversifies into the florist or pizza business in San Francisco and uses its fleet of trucks to deliver flowers or pizza in the Bay Area, presumably the selling of flowers or pizza become activities preempted from state regulation whether airplanes play any part in the delivery or not. I cannot accept this argument. . ." 936 F.2d at 1080-81; A10.

[5] The Court has invited the Solicitor General to express the views of the United States in *Morales v. Trans World Airlines* and *Attorney General of California v. Trans World Airlines*, Nos. 90-1604 and 90-1606, which seek review of the Fifth Circuit's determination that § 1305(a)(1) preempts the enforcement of state laws relating to the false advertising of air fares. *See* Order dated June 10, 1991. The preemption question in those cases is distinct from that presented here. Moreover, the regulation preempted here is far more attenuated from the "rates, routes, or services of any air carrier" than in those cases, and the Ninth Circuit's conclusion has a potentially far broader impact on state regulation since it would preempt state economic regulation of virtually *all* activities of air carriers, whether or not they relate to the provision of air transportation.

the Airline Deregulation Act and this Court's preemption decisions. It directly undermines the ability of California and other states to ensure fair competition and non-discrimination among motor carriers engaging in intrastate trucking activities and simultaneously threatens the ability of the states to protect public safety. Finally, it provides no workable standard for determining the extent to which a particular state regulatory scheme is preempted, thereby inviting years of burdensome litigation across the country between individual states and individual trucking companies.

The Ninth Circuit's decision will seriously impact thousands of trucking companies and their employees, state regulatory commissions and highway traffic enforcement authorities in each of the fifty states, the consumers, senders and recipients of goods or packages delivered by truck, and drivers and passengers on the nation's highways.

For these reasons, the writ should issue.

I

THE NINTH CIRCUIT'S CONCLUSION THAT § 1305(a)(1) PREEMPTS CALIFORNIA'S ECONOMIC REGULATION OF FEDERAL EXPRESS'S OPERATIONS WHICH ARE CONDUCTED SOLELY INTRASTATE AND EXCLUSIVELY BY TRUCK CONFLICTS WITH THE INTENT OF CONGRESS AND THE PREEMPTION DECISIONS OF THIS COURT

Contrary to the conclusion of the Ninth Circuit, § 1305(a)(1) does not preempt California's economic regulation of Federal Express's intrastate motor carrier operations "either explicitly, implicitly, or by virtue of an actual conflict." *Wisconsin Public Intervenor v. Mortier,* 111 S.Ct. 2476, 2482 (June 21, 1991). Acknowledging that "common sense and common practice have forbidden that [§ 1305(a)(1)] be taken literally and have restricted its range," 936 F.2d at 1078; A5, *citing Air Transport Ass'n v. Pub. Util. Comm'n of California,* 833 F.2d 200, 207 (9th Cir. 1987), *cert denied,* 487 U.S. 1236 (1988), the Ninth Circuit majority nevertheless fails to give due weight to the fundamental

presumption "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Mortier, supra,* 111 S.Ct. at 2482, *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See also Pacific Gas & Elec. Co. v. Energy Resources Comm'n of California,* 461 U.S. 190, 205-6 (1983).

As is made abundantly clear by the District Court, 716 F.Supp. at 1302-5; B5-11, and the dissent, 936 F.2d at 1079-81; A7-12, the most plausible reading of the plain words of the statute is that § 1305(a)(1) only preempts state regulation of rates, routes, or services pertaining to *air transportation*. A contrary construction would mean that "virtually any carrier-owned or operated service would escape state regulation if it established the slightest nexus between its various activities." 716 F.Supp. at 1303; B7 (footnote omitted). Notably, the District Court found that "[a]lthough Federal Express's ground operations are commercially linked to its air transportation system, its hauling operations are not substantially different from services provided by other motor carriers." *Id.* Federal preemption of state economic regulation of Federal Express's intrastate motor carrier operations is thus not the "clear and manifest purpose of Congress." *Mortier, supra*, 111 S.Ct. at 2482.[6]

The Court of Appeals decisions applying § 1305(a)(1) uniformly hold that the statute's preemptive effect only extends to the *air* rates, routes, and services of air carriers. *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984) (regulation of air carrier seating policies for handicapped passengers relates to air services); *Anderson v. USAIR*, 818 F.2d 49, 57 (D.C. Cir. 1987) (same); *Illinois Corporate Travel v. American Airlines*, 889 F.2d 751, 754 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1948 (1990) (prohibition of certain advertising concerning airfares relates to air rates); *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157, 173-75 (1st Cir. 1989)

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[6] *See also* Jordan & Hoffman, *Federal Preemption of State Laws Regulating For-Hire Motor Carriers Transporting Property (Including Baggage) as Part of an Intrastate Air/Truck Shipment*, 19 Transp. L.J. 335, 344-55 (1991).

(aircraft landing fee regulations relate to air service); *O'Carroll v. American Airlines*, 863 F.2d 11, 13 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989) (state law claims by passenger for wrongful exclusion from airline flight relate to air service); *Trans World Airlines v. Mattox*, 897 F.2d 773, 780-83 (5th Cir.), *cert. denied*, 111 S.Ct. 307 (1990), *cert. pending*, Nos. 90-1604 and 90-1606 (*see* Note 5, *supra*) (state laws proscribing deceptive advertising of airfares relates to air rates). Each of these cases shows that § 1305(a)(1) preemption has been applied where the state law or regulation clearly relates to the rates or service of the *air operations* of an air carrier.

On the other hand, the Court of Appeals decisions have not found air carrier operations that are not singularly *air transportation* operations immune from state regulation. In *Air Transport Ass'n, supra*, 833 F.2d 200, an association of airlines challenged a CPUC regulation that prohibited eavesdropping on telephone calls without providing notice to the conversing parties. The airlines monitored conversations between their reservation agents and members of the public. The Ninth Circuit held that California's prohibition of undisclosed telephone monitoring by the airlines did not relate directly or indirectly to the rates, routes, or services of an airline. The Court noted that there was nothing in the Federal Aviation Act or its history indicating that Congress intended to preempt all state regulation which affects airlines. *Id.* at 207. Similarly, in *West v. Northwest Airlines*, 923 F.2d 657 (9th Cir. 1990), the Ninth Circuit held in part that § 1305(a)(1) does not preempt state compensatory damages remedies for airline overbooking. The Court concluded that "state laws that merely have an *effect* on airline services are not preempted." *Id.* at 660 (emphasis in original).

California's position is also supported both by other provisions of the Airline Deregulation Act and the Act's legislative history. While the Act's definitions of "interstate air transportation" and "interstate air commerce" comprehend the movement of commerce "partly by aircraft and partly by other forms of transportation," 49 U.S.C. App. §§ 1301(23) and 1301(24), these definitions do not support the Ninth Circuit's conclusion. California does not seek to regulate packages which have moved or will

move by air. *See* 936 F.2d at 1080; A9; 716 F.Supp. at 1304; B8. Moreover, the fact that "air transportation" is defined as including commerce "partly by aircraft and partly by other forms of transportation" strongly suggests, under the principle of *inclusio unius exclusio alterius*, that movements only by "other forms of transportation" are not covered by the Act.

Similarly, the legislative history of § 1305(a)(1) is bereft of any reference to ground transportation. *See* H.Rep. No. 95-1211, 95th Cong., 2nd Sess. 15-16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3751-52; H.Conf.Rep. No. 95-1779, 95th Cong., 2nd Sess. 94-95, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3773, 3804-5. The same is true of the legislative history of the 1984 amendments to § 1305(a)(1). *See* H.Rep No. 98-793, 98th Cong., 2nd Sess. 1-17, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2857, 2857-2873; H.Conf.Rep. No. 98-1025, 98th Cong., 2nd Sess. 13-21, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2874, 2874-2882. The whole focus of the Airline Deregulation Act was to preclude the states from regulating air services and air transportation, *Hughes Air Corp. v. Pub. Util. Comm'n of California*, 644 F.2d 1334, 1336-37 (9th Cir. 1981), not intrastate truck transportation.

California's position is also supported by the federal statutes governing the regulation of motor carriers. Numerous post-1978 amendments to the Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.*, have left state economic regulation of intrastate motor carriage undisturbed. One such provision, 49 U.S.C. § 10521(b)(1), provides in pertinent part that nothing in the Act is to "affect the power of a state to regulate intrastate transportation provided by a motor carrier." A second provision, 49 U.S.C. § 10521(b)(2), leaves to the states the authority to regulate the rates of "intrastate transportation provided by a motor carrier." A third provision, 49 U.S.C. § 10521(b)(3), leaves intact state authority to "allow a motor carrier to provide intrastate transportation on the highways of a State." And a fourth provision, 49 U.S.C. § 10521(b)(4), leaves undisturbed "the taxation power of a State over a motor carrier."

In addition, the Interstate Commerce Act delineates those situations in which interstate motor carriage is so closely an

adjunct of air transportation that it becomes exempt from federal motor carrier regulation. *See* 49 U.S.C. §§ 10526(a)(8)(B) (exempting the transportation of property transported by motor vehicle and, as part of a continuous movement, transported by air), 10526(a)(8)(C) (exempting transportation by motor vehicle in lieu of by air under emergency conditions). As noted by the District Court, these provisions "suggest that Congress viewed ground and air transportation as belonging to two different regulatory regimes under normal circumstances." 716 F.Supp. at 1305; B10.

The Ninth Circuit makes much of the commingling of "interstate" packages and "intrastate" packages in Federal Express's trucks. It observes that "[e]very truck carries packages that are in interstate commerce by air." 936 F.2d at 1078; A5. But 49 U.S.C. § 10528, which provides that the existence of "mixed" truck loads "shall not affect the unregulated status of [the] exempt property or the regulated status of the property which the carrier is authorized to transport under [its] certificate or permit," strongly suggests that the majority's observation is without significance. Moreover, this Court has upheld dual state-federal regulation of the rates, services and facilities of telephone companies when to do so affirms the will of Congress. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373-76 (1986). *See also* dissent, 936 F.2d at 1080 n. 4; A9.

Finally, it must be noted that Federal Express's preemption claim is essentially a facial challenge to the CPUC's economic regulation. The CPUC's economic regulatory program includes provision for the authorization of variances, and the CPUC has consistently maintained that Federal Express will be accorded such variances from any economic regulatory requirements which unduly burden its operations. E177, E195, F6-7, F10-12. Nonetheless, because Federal Express has failed to seek such variances, it is not known "how California actually applies its regulatory system to Federal Express's business." 936 F.2d at 1081; A12; *see also* 723 F.Supp. at 1383; C7. Under the circumstances of this purely facial challenge, Federal Express must show that there is no possible set of regulatory requirements the CPUC could impose upon it that would not conflict with federal law—

i.e., that "any state [economic regulation] is *per se* preempted." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 579-80 (1987). This it cannot do.

The Airline Deregulation Act does not preempt California's economic regulation of Federal Express's intrastate trucking operations either expressly, impliedly or by virtue of a conflict.

II

THE NINTH CIRCUIT'S DECISION UNDERMINES CALIFORNIA'S ABILITY TO ENSURE FAIR COMPETITION AND TO PROHIBIT DISCRIMINATION AMONG MOTOR CARRIERS ENGAGING IN INTRASTATE TRUCKING ACTIVITIES AND THREATENS CALIFORNIA'S ABILITY TO PROTECT PUBLIC SAFETY

California has adopted a system of pro-competitive, flexible and adaptive economic regulation in place of traditional cost-of-service regulation for common and contract carriers in the intrastate freight trucking industry. *See generally General Freight, supra,* 33 Cal.P.U.C.2d 333 (1989), *modified,* 35 CAl.P.U.C.2d 307 (1990); App. E1-205. The CPUC's program allows the efficiencies of the marketplace to determine transportation rates subject to certain safeguards, including some limitations on common carrier rates, a program for monitoring competitive conditions, a minimum level of service for common carriers, a requirement that all rates and associated discounts be filed and available for public inspection, and a toll-free telephone number for verifying carrier operating authority. E10. The Ninth Circuit's decision invalidating the CPUC's flexible regime of economic regulation as to Federal Express thwarts the CPUC's policies of preventing rate discrimination, assuring safe and reliable service, and fostering an environment of fair and workable competition among intrastate carriers.

As noted by the dissent, 936 F.2d at 1081; A11, and the District Court, 723 F.Supp. at 1383; C7, the preemption ratified by the Ninth Circuit's decision singles out Federal Express for more favorable treatment than that accorded other motor carriers engaged in intrastate trucking operations in California. As a

result, the Ninth Circuit's "decision will free the trucking business of Federal Express from any state economic regulation [and] will open the door for substantial increases in Federal Express's trucking business and give it a substantial competitive advantage over trucking companies that must comply with state regulation." 936 F.2d at 1081; A11.[7]

This anticompetitive impact undermines the regulatory goals of California's pro-competitive program—the assurance of fair competition and the effective elimination of discriminatory practices. Under the Ninth Circuit's decision, Federal Express will be able to evade the CPUC's tariff requirements, thereby facilitating its skimming the cream from the market by making private undisclosed agreements with specially targeted customers. It will be able to change its rates without public notice, thus enabling it to give preferences to some shippers and not to others. And it will be excused from paying its share of at least that portion of the fees which relates to and supports the state's economic regulatory program.

In addition, while the Ninth Circuit holds Federal Express to its concession that it is not challenging the CPUC's regulation of trucking safety, the logic of the majority's position threatens California and other states with a significant erosion of their ability to protect public safety. The Ninth Circuit concludes, for example, that Federal Express's "terms of service" are immune from state regulation because "[t]o regulate them is to affect the price." 936 F.2d at 1078; A6. The same could be said of safety regulation. Again, as noted by the District Court, under the interpretation of the statue urged by Federal Express, "virtually any air carrier-owned or operated service would escape state regulation if it established the slightest nexus between its various activities." 716 F.Supp. at 1303; B7.

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[7] Federal Express has announced its intention to expand its trucking operations from packages to general freight with its new Heavyweight Service designed to deliver shipments of any size or weight by the morning of the second day. The Los Angeles-San Francisco corridor is apparently targeted for this service. *See* Go-West Magazine, Apr., 1991, p. 36; Transport Topics, Apr. 15, 1991, p. 3.

III

THE NINTH CIRCUIT'S DECISION CREATES SUBSTANTIAL UNCERTAINTY AND CONFUSION AND INVITES ENDLESS LITIGATION

The Ninth Circuit's decision creates a fundamentally unworkable rule which invites widespread confusion and endless litigation. It provides no standard for ascertaining when an air carrier's ground transportation loses its immunity from state economic regulation. As noted by the dissent:

> The majority really does not set out a rationale for determining when an air carrier's ground transportation loses its quality as air transportation. The majority decision could be read as exempting any transportation services Federal Express wishes to provide. The majority does not tell us how many airplanes Federal Express must fly to Sacramento each month, in order to insulate daily truck traffic between Oakland and Sacramento from state regulation. Will one Cessna 208 carrying three packages between Oakland and Sacramento authorize Federal Express to send a dozen trucks packed with goods between the two cities free of state regulation? . . . In my view, we should apply the plain language of the statute.

936 F.2d at 1081; A11 (footnote omitted).

In addition, it provides no clear standard for ascertaining when preëmpted economic regulation becomes permitted non-economic regulation, *see* 936 F.2d at 1081 n. 4; A9, thereby raising the question of which provisions in the motor carrier regulatory schemes of the fifty states are preempted and which are not. And it also provides no clear basis for ascertaining who is immune from state regulation, thus raising the spectre of motor carriers which conduct most or all of their business solely by truck seeking air carrier certificates under 49 U.S.C. App. § 1371 to obtain immunity from state regulation of their trucking operations. In sum, the Ninth Circuit's resolution of the issue engenders great uncertainty and invites endless litigation between individual states and individual companies. As observed by the dissent,

> This approach is flawed in my view because it does not guide the trial bench and the bar in deciding other cases. My proposed resolution has the advantage of providing a bright line rule.

936 F.2d at 1801 n. 6; A10.

CONCLUSION

California respectfully requests that the Court issue a writ of certiorari to review the judgment of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

FEDERAL EXPRESS CORPORATION,
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Stanley W. Hulett; Donald Vial; Frederick R. Duda;
John B. Ohanian; G. Michael Wilk; Victor Weiser;
Norman Kelley,
Defendants-Appellees.

No. 89-16444.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 14, 1991.

Decided June 25, 1991.

Dissenting Opinion June 27, 1991.

Before BEEZER and NOONAN, Circuit Judges, and SINGLETON*, District Judge.

NOONAN, Circuit Judge:

Federal Express Corporation (Federal Express) brought suit against the California Public Utilities Commission and individual named defendants (the PUC), seeking a declaration that regulations of the PUC, as applied to Federal Express, impose an unconstitutional burden on interstate commerce and are preempted by the Airline Deregulation Act, 49 US.C. App. § 1305, and an injunction against the PUC enforcing them against Federal Express. On cross-motions for summary judgment, the district court found no preemption and no unconstitutional burden and entered judgment for the PUC 723 F.Supp. 1379. We now reverse the district court and direct that judgment be entered for Federal Express.

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* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

FACTS

The following facts are undisputed:

Federal Express is an air carrier operating under the authority of the Civil Aeronautics Board as provided in subchapter IV of the Federal Aviation Act of 1958, 49 U.S.C. App. § 1371. The carrier operates sixty Boeing 727 aircraft, twenty-one DC10 aircraft, and more than one hundred specifically designed Cessna-208 aircraft. In planes operated, Federal Express is one of the largest airlines in the United States.

Federal Express is an "all-cargo" carrier, that is, it carries no passengers. It carries packages. The packages are picked up by van in the communities serviced, trucked to an airport, flown to a "hub" where they are sorted, put on other aircraft to their destinations, and trucked by van to their recipients. Federal Express' main hub is Memphis. Between midnight and two o'clock each morning over 700,000 packages are delivered, sorted, and re-routed at the Memphis facility.

Oakland, California is a regional hub in this system. Packages destined for ten western states are transported here, sorted, and sent on to their destinations. Over 200,000 packages each week are transported that have both their origin and destination in California. Packages collected at Oakland and bound for Los Angeles may be shipped there in three different ways: (1) to Memphis, back to Los Angeles; (2) directly to Los Angeles by air; (3) by truck from Oakland to Los Angeles. The trucks carry the packages in specially designed "aircraft containers." In the evening a single truck runs from Oakland to Los Angeles, and two trucks go from Los Angeles to Oakland carrying packages that do not fit on board the Oakland-bound night flight. In the morning one truck goes from Oakland to Los Angeles and one from Los Angeles to Oakland carrying second day delivery packages that do not make the evening flight. Most of the packages in any truck are packages in interstate commerce; some carry exclusively interstate packages.

Federal Express guarantees delivery by 10:30 a.m. the day after a package has been picked up. There is a full refund if a package is even one minute late. To keep this schedule, even the most

minor delays must be avoided, and Federal Express must be prepared to meet changing weather, mechanical breakdowns, and varying conditions at airports. As the system operates as an integrated whole, a delay of even one half-hour at an airport may affect thousands of packages at the Memphis sorting point. The system would not achieve its goal of certain, speedy service without backup equipment and alternative modes of transportation. In particular, as far as Federal Express's California operations are concerned, the choice of one of the three modes of transportation from Oakland to Los Angeles depends on air traffic, control delays, weather, aircraft availability, and the volume of packages in the entire system.

As trucks are an essential component of the system, Federal Express operates over 2,600 trucks in California. The trucks are licensed to use the highways by the PUC. Up until early 1987 Federal Express also paid a quarterly fee assessed by the PUC on its estimated gross operating revenue under Cal.Pub.Util.Code § 5003.1.

The PUC is an agency of the state of California with authority to regulate common carriers on the highways of California. California Constitution, Art. XII, § 4; Cal.Pub.Util.Code §§ 1063 and 3501 et seq. (West 1975 & Supp.1991). Under the statutory authority conferred by Public Utility Code §§ 486-496 the PUC has issued orders governing the tariffs of common carriers, General Order 80-C, February 7, 1990; for the suspension of the tariffs, General Order 113-B, July 2, 1980; and for their public inspection, General Order 139, September 1, 1976. The PUC regulates the terms of the bills of lading the freight bills and "accessorial services" documents issued by the carriers, General Order 155, March 1, 1987. The PUC provides a procedure by which carriers may obtain variances from its orders. The PUC has represented to the court that its regulatory program is "flexible" and "adaptive."

PROCEEDINGS

On September 23, 1987 Federal Express brought this action in the district court with the results stated above. Federal Express appeals.

ANALYSIS

Federal Express appeals both on the ground that the state regulation excessively burdens interstate commerce and on the ground that state regulation is preempted by act of Congress. We need not and do not consider the first ground as we find statutory preemption exists. As this legal conclusion is dispositive, there is no need for further proceedings in the case other than entry of judgment.

In the section on federal preemption, the Airline Deregulation Act of 1978 provides as follows:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C.App. § 1305(a)(1) (1988). The exception provided in subsection (2) is air transportation wholly within the state of Alaska. It has no application here.

Federal Express is an air carrier having authority under subchapter IV, 49 U.S.C. App. § 1371, to provide air transportation. The PUC is seeking to impose regulations with the effect of law on its services. Q.E.D.—federal preemption is required by a federal statute that expressly preempts state regulation.

Our cases, however, have not read the statute quite so literally or without attention to the context of other law into which the statute fits. Thus we have taken into account the presumption against preemption when Congress legislates in the fields of common law tort and contract. *See California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989); *West v. Northwest Airlines*, 923 F.2d 657, 659 (9th

Cir.1991). While preemption has been enforced against a claim based on a state statute regulating access to transportation, an accompanying tort claim for the intentional infliction of emotional harm was held to be unpreempted. *Hingson v. Pacific Southwest Airlines,*743 F.2d 1408, 1415-16 (9th Cir.1984).

In a closer case we have also recognized that a California regulation against the recording of telephone conversations without warning could be applied to an airlines, reservation system and was not preempted. *Air Transport Ass'n v. Public Util. Comm'n,* 833 F.2d 200, 207 (9th Cir.1987), *cert. denied,* 487 U.S. 1236, 108 S.Ct. 2904, 101 L.Ed.2d 936 (1988). Indeed, the district court relied on this decision in making its decision in the instant case. But we did inject the caution in *Air Transport:* "This is not, however, an appropriate case for the definitive resolution of the scope of federal preemption under the Deregulation Act." *Id.* The regulation in question was construed to relate to neither rates nor routes nor services of an air carrier. *Id.*

Air Transport should be understood as allowing the state to act in an area of non-economic regulation—to impose a general rate for the protection of telephone users without carving out an exception for air carriers. In the same way it is uncontested in this case that the general traffic laws of California and its safety requirements for trucks on its highways apply to Federal Express; only economic regulation is challenged. In short, despite the very broad and apparently all-inclusive language of the statute, common sense and common practice have forbidden that the statute be taken literally and have restricted its range. Interpreted in terms of its purpose and in the context of other laws, the Airline Deregulation Act as it applies in this case preempts action by the state that regulates the rates and terms of service offered by an air carrier.

The trucking operations of Federal Express are integral to its operation as an air carrier. The trucking operations are not some separate business venture; they are part and parcel of the air delivery system. Every truck carries packages that are in interstate commerce by air. The use of the trucks depends on the conditions of air delivery. The timing of the trucks is meshed with the

schedules of the planes. Federal Express owes some of its success to its effective use of trucking as part of its air carrier service.

The PUC's regulation of rates, of discounts and promotional pricing, of claims, of overcharges, of bills of lading and freight bills, and its imposition of fees enters the zone that Congress has forbidden the states to enter. Its regulatory scheme does not restate common law principles of tort and contract. Its regulatory scheme goes far beyond safety on highways. Most of the regulations challenged here are obviously economic—they bear on price. Those regulations which are not patently economic—the rules on claims and bills of lading, for example—relate to the terms on which the air carrier offers its services. Terms of service determine cost. To regulate them is to affect the price. The terms of service are as much protected from state intrusion as are the air carrier's rates.

Our reading of the plain words of the statute is confirmed by consideration of the purposes of the Airline Deregulation Act and the Federal Aviation Act of 1958. The aim of federal preemption is to prohibit a state "from enacting any law, establishing any standard determining routes, schedules, or rates, fares, or charges in tariffs of, or otherwise promulgating economic regulations, for any air carrier certified by the Board." H.Conf.Rep. No. 1779, 95th Cong., 2d Sess. 94, *reprinted in* 1978 U.S. Code Cong. & Admin.News 3737, 3773, 3804. The Federal Aviation Act of 1958 confided to federal authority the "promotion of adequate, economical, and efficient service by air carriers at reasonable charges," 49 U.S.C. § 1302(c). Amending the 1958 act in 1977, Congress specifically required "a sound regulatory environment" where decisions, "reached promptly," "facilitate adaptation of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States," 49 U.S.C.App. § 1302(a)(5). In particular, in 1977, Congress sought the "encouragement and development of an expedited all-cargo air service system," 49 U.S.C.App. § 1302(b)(1), and Congress sought under the same heading, "Factors for all-cargo air service," the "encouragement and development of an integrated transportation system," 49 U.S.C.App. § 1302(b)(2).

Federal Express is exactly the kind of an expedited all-cargo service that Congress specified and the kind of integrated transportation system that was federally desired. Because it is an integrated system, it is a hybrid, an air carrier employing trucks. Those trucks do not destroy its status as an air carrier. They are an essential part of the all-cargo air service that Federal Express innovatively developed to meet the demands of an increasingly interlinked nation. Congress has freed it from the constrictive grasp of economic regulation by the states.

REVERSED and REMANDED with instructions to enter judgment for the plaintiffs granting the injunctive relief requested.

SINGLETON, Jr., District Judge, dissenting.

Congress has preempted state regulation of certain activities of air carriers. The statute provides in part:

> [N]o state or political subdivision thereof [except Alaska] . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter

49 U.S.C.App. § 1305(a)(1) (1988). In this case we are asked to apply this statute to the operations of Federal Express Corporation (Federal Express), a conceded air carrier. We must determine whether Congress intended to preempt state economic regulation of Federal Express's transportation of cargo exclusively by truck and exclusively within the borders of California. I am of the view that Congress did not intend to preempt state regulation of Federal Express's purely intrastate trucking business and therefore dissent from this court's decision.

This case turns on the meaning of certain phrases in the applicable statute. In order to determine the scope of the statute we must determine whether California's threatened economic regulations "relat[e] to rates, routes, or services of any air carrier [authorized by federal law] to provide air transportation." Clearly Congress intended to exempt activities pertaining to setting rates, determining routes, and providing services of an air carrier neces-

sary to provide air transportation.[1] It would appear equally clear that Congress did not intend to exempt activities of an air carrier that were not related to the provision of air transportation.[2]

In determining which activities are exempt and which are not, it is useful to consider an analogy to the insect kingdom. All caterpillars have the potential of becoming butterflies and flying above the earth. However, many caterpillars succumb before metamorphosis and live their entire lives earthbound. If we analogize packages to insects, this case is about caterpillars and not butterflies.[3]

California's concessions make this an easy case. The state recognizes that in order to transport goods by air it is necessary to get them from a collection point to an airplane and that state economic regulation of incidental truck traffic is preempted. The

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[1] Congress defines an "air carrier" as a citizen of the United States engaging in "air transportation." 49 U.S.C.App. § 1301(3) (1988). Congress defines "air transportation" in part as "interstate" transportation by aircraft. 49 U.S.C.App. § 1301(10). "Interstate air commerce" means "the carriage by aircraft of . . . property for compensation . . . whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." 49 U.S.C.App. § 1301(23).

California apparently does not contend that these definitions restrict the exemption in section 1305 to state regulation of interstate transportation of goods by aircraft, nor does it contend that the statute permits state regulation of intrastate carriage of goods by air. It does argue, however, that by defining "air transportation" to include goods carried in part by aircraft and in part by trucks. Congress did intend to permit state regulation of goods carried exclusively by truck.

[2] For purposes of analysis it is useful to refer to those activities which Congress chose not to regulate and which it preempted the states from regulating as exempt activities. Those activities which the states are free to regulate will be called nonexempt activities.

[3] Parcels which are carried at some point in an airplane for brevity will be called air packages. Those parcels that never see the inside of an airplane will be called land packages. By analogy air packages would be butterflies and land packages caterpillars. It might be more apt to call them dead caterpillars because if they reach their destination without ever entering an airplane they never will become butterflies.

state also implicitly concedes that if Federal Express picks up a package in Memphis, flies it to Oakland, and transports it by truck to Los Angeles, the entire trip, including the ground leg, is preempted from state regulation. Thus California makes no claim to regulate commerce carried wholly or partly by airplane. *See* 49 U.S.C.App. §§ 1301(10) and (24) (1988).

California seeks to regulate the carriage of only those packages that never see the interior of an airplane. I see nothing in the cited statute that preempts California from doing so. It seems clear to me that transporting packages solely by truck within California is not a service of an air carrier authorized to provide air transportation.

The majority never explains how the carriage of goods by land is somehow transformed into the carriage of goods by air.[4] Federal

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[4] The majority never expressly discloses it reasoning. The majority opinion describes Federal Express's air transportation activities. It argues a point that California concedes, that Congress would frown on attempts to regulate air transporation. It finesses the question presented here whether transportation of land packages is exempt from regulation. It distinguishes certain cases. It pursues another point conceded by California, that transportation of air packages in Federal Express trucks is exempt and it concludes with a paean to deregulation of air carriers. Implicit in the opinion is the assumption that Federal Express has so integrated its business by including both air packages and land packages in each truck, that California's attempts to regulate the latter necessarily regulates the former. If this is the rationale, then the holding would be that anytime an industry intermixes exempt and nonexempt activities neither can be regulated by the state. If the United States Supreme Court or this court had ever previously so held, those decisions should be cited rendering the majority's opinion unassailable. The majority cites no cases for this proposition, however. Rather, it seeks to distinguish prior decisions of this court which held that state regulation of activities which were clearly "services of an air carrier" were not preempted. Even if we accept the distinction the majority draws between "economic" and "non-economic" regulation, a troublesome distinction in context, the distinction does not advance the majority's decision. The fact that regulation of some "air services" is not preempted does not support a holding that services that have no connection with "air transportation" are preempted.

Express has a number of arguments. It contends the statute exempts any service performed by an air carrier, and concludes that it is primarily an air carrier and so any transportation activity it conducts automatically becomes exempt.[5] Thus, if Federal Express diversifies into the florist or pizza business in San Francisco and uses its fleet of trucks to deliver flowers or pizza in the Bay Area presumably the selling of flowers or pizza become activities preempted from state regulation whether airplanes play any part in the delivery or not. I cannot accept this argument and I do not believe the majority intends its decision to extend this far.[6]

Federal Express's primary argument is that its business is so integrated that it would be inconvenient to segregate land packages from air packages. In fact Federal Express maintains that no one ever knows until the last minute whether a given package will be flown or driven to its intrastate destination. To accept this argument is to confuse Federal Express's other commerce clause arguments with its preemption arguments. Federal Express's unilateral decision to mix its intrastate carriage of goods by truck

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[5] Federal Express errs in my view by focusing on the term "services" in the statute and ignoring the context "of an air carrier authorized to provide air transportation." In context, it is clear that only "air services," by which I mean services constituting air transportation, are exempt.

[6] The majority might respond to the "pizza" example by echoing Justice Holmes famous riposte, "not . . . while this court sits." *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223, 48 S.Ct. 451, 453, 72 L.Ed. 857 (1928) (Holmes, J., dissenting). While unwilling to formulate a principle that would distinguish "air services" from other potential services of an air carrier, the majority might recognize a point at which ground services were so divorced from air services that economic regulation of the former would not impede performance of the latter. Compare Justice Stewart's test for obscenity, "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring).

This approach is flawed in my view because it does not guide the trial bench and the bar in deciding other cases. My proposed resolution has the advantage of providing a bright line rule.

with the carriage of other packages taken from airplanes cannot transform purely ground transportation into air transportation.

The majority may be influenced by the fact that only a small percentage of the packages currently carried by Federal Express trucks really qualify as caterpillars. On this record, the overwhelming majority appear to be butterflies. We must recognize, however, that nothing is static in the highly competitive transportation industry. The majority's decision will free the trucking business of Federal Express from any state economic regulation. This will open the door for substantial increases in Federal Express's trucking business and give it a substantial competitive advantage over trucking companies that must comply with state regulation. The majority really does not set out a rationale for determining when an air carrier's ground transportation loses its quality as air transportation. The majority decision could be read as exempting any transportation services Federal Express wishes to provide. The majority does not tell us how many airplanes Federal Express must fly to Sacramento each month, in order to insulate daily truck traffic between Oakland and Sacramento from state regulation. Will one Cessna 208 carrying three packages between Oakland and Sacramento authorize Federal Express to send a dozen trucks packed with goods between the two cities free of state regulation? The majority does not address packages deposited on the San Francisco peninsula for delivery in the East Bay that never see an airplane. In my view, we should apply the plain language of the statute.[7] Federal Express's air transportation services, including land transportation incidental thereto, are exempt from state regulation while its exclusively intrastate land transportation services are not exempt from state regulation. If

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[7] Miners search for gold in creek beds and frequently are misled by pyrites. Judges search for plain meaning in statutes and are frequently misled by a mirage. A claim that any statute has a "plain meaning" is at the very best an overstatement. More often it begs the question to be answered. My view of the statute at least finds support in its context and if we look beyond immediate context my reading of the statute finds support in Congress's purpose as disclosed in the language used in the statutes governing air carriers as a whole.

the two overlap, we are presented with general commerce clause concerns, not preemption concerns.

The majority finds preemption and therefore has no need to address Federal Express's other commerce clause arguments. The trial court essentially found that the commerce clause challenges were not ripe for resolution until Federal Express sought and was denied state exemptions. In the trial court's view until we know how California actually applies its regulatory system to Federal Express' business, it is premature to decide the commerce clause issues. This view seems plausible to me but the state only reluctantly endorsed it after much prodding at oral argument.[8]

If we were to conclude that all the commerce clause issues were ripe for adjudication and elect to decide those issues now, I would be reluctant to do so on a summary judgment record. I do not believe that all material facts are undisputed. I would much prefer to give the parties their day in court and then have the trial court address each of Federal Express's contentions in carefully fashioned findings of fact. *See* Fed.R.Civ.P. 52. I therefore respectfully dissent and favor affirming the trial court's decision on the preemption issue but remanding on other commerce clause issues for findings of fact and conclusions of law after a full hearing on the merits.

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[8] The state prefers to argue that even if all of Federal Express's factual assertions are accepted as true, Federal Express has not sustained its burden under the standards articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct.844, 25 L.Ed.2d 174 (1970). I am unpersuaded that Federal Express's other commerce clause arguments can be resolved as a matter of law.

APPENDIX B

FEDERAL EXPRESS CORP.,
Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.,
Defendants.

No. C-87-4891 MHP.

United States District Court,
N.D. California.

March 30, 1989.

MEMORANDUM AND ORDER

PATEL, District Judge.

Plaintiff, which provides a nationwide small package express delivery service, brought this action seeking a declaration that California Public Utilities Code §§ 486-496 are unconstitutional as an impermissible burden on interstate commerce under the Commerce Clause and as preempted by the Airline Deregulation Act ("the Act"), 49 U.S.C.App. § 1305. Plaintiff also seeks an injunction preventing defendants from enforcing regulations promulgated pursuant to state statutory authority. The case is now before the court on cross-motions for summary judgment. Having considered the submissions of the parties, for the following reasons, the court grants defendants' motion for summary judgment on the preemption issue only. The court denies both motions for summary judgment on the burden on interstate commerce issue and orders the parties to submit supplemental pleadings on that issue.

BACKGROUND

Federal Express operates an interstate package air delivery system nationwide under a grant of authority pursuant to the Federal Aviation Act, 49 U.S.C.App. § 1371. Plaintiff charges all customers throughout the country the same rates for service. Plaintiff claims that it does not offer an intrastate delivery service in California that is separate from its nationwide service. Plaintiff

concedes, however, that 3.5% of its total volume represents business that both originates in and is destined for locations within California. According to plaintiff packages originating and destined for California may be transported through three different sorting routes: 1) by air to Memphis; 2) by air to Los Angeles or Oakland; or 3) by truck to Los Angeles or Oakland when air transportation is not available due to lack of capacity or adverse weather conditions. If the packages are sent to Memphis, they are then flown back to California. With each method, the packages are transported to their final destinations in California by small trucks.

Defendants California Public Utilities Commission (hereinafter "CPUC") and its various officials regulate the portion of plaintiff's business which is conducted purely intrastate and solely by truck. Since 1984, Federal Express has sought and received two types of authority from the CPUC: a California Highway Common Carrier Certificate, which is registered to a subsidiary, and a California Highway Contract Carrier Permit. Plaintiff also conducts intrastate business pursuant to a rate tariff filed with the CPUC which became effective February 1, 1985. According to the CPUC, Federal Express' subsidiary paid quarterly transportation rate fund fees to the CPUC from 1984, after obtaining intrastate motor carrier authority, until some point in 1987.

In 1986, the CPUC learned of a Tennessee lawsuit in which plaintiff's vice president H. Doyle Cloud testified that Federal Express was operating in California without paying authorization ground transportation rates because it believed that the regulations did not apply to it as an interstate carrier. By letter of November 20, 1986, addressed to plaintiff's chief executive officer, the CPUC staff initiated an informal investigation of plaintiff's failure to comply with state licensing regulations. This informal investigation culminated in June 1987 with a formal staff letter identifying two areas of noncompliance and requiring complete correction by November 1, 1987, to avoid formal enforcement action. Although plaintiff failed to comply with this demand, the CPUC never initiated formal enforcement proceedings.

Plaintiff also failed to comply with certain regulatory reporting requirements. The CPUC responded by imposing fines and threatening other penalties.

Plaintiff filed this action for declaratory and injunctive relief on December 9, 1987. On May 17, 1988, the court denied defendants' motion to dismiss the complaint. Defendants have submitted papers showing that the CPUC has agreed not to pursue any related action against Federal Express regarding the payment of fees or the filing of reports during the pendency of this lawsuit.

EVIDENTIARY MOTIONS

Plaintiff has made five motions to strike various portions of defendants' submissions. The court rules as follows:

1) The motion to strike pages 26 through 35 of defendants' memorandum of points and authorities is DENIED, since that submission was within the limits previously set by this court.

2) The motion to strike the portion of the Quinn declaration and article regarding Federal Express' advocacy of a nationwide campaign to preempt state motor carrier jurisdiction is GRANTED, since such evidence is irrelevant to this action.

3) The motion to strike references to United Parcel Service and Purolator Courier is GRANTED, since those references are inadmissible hearsay.

4) The motion to strike the opinion offered by CPUC official Donald H. Smith about tracking intrastate ground movements is GRANTED, since that opinion lacks foundation and Mr. Smith has not been qualified as an expert witness.

5) The motion to strike a legal memorandum which was cited in and attached to a letter sent by the CPUC to Federal Express in February 1987 is DENIED, insofar as that memorandum is admitted only for the purpose of showing how the CPUC informed plaintiff of its enforcement operations and not for the content of the legal opinion.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). *See also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987) (the nonmoving party may not rely on the pleadings but must present specific facts creating a genuine issue of material fact); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

The court's function however, is not to make credibility determinations. *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *T. W. Elec. Serv.*, 809 F.2d at 631.

DISCUSSION

Federal Express contends that the application of CPUC regulations to its intrastate ground operations is unconstitutional on two grounds: 1) such regulations are preempted by the Airline Deregulation Act, 49 U.S.C.App. § 1305, under the Supremacy Clause (Art. VI, cl. 2) of the U.S. Constitution; and 2) such regulations place an unconstitutional burden on interstate commerce, under the Commerce Clause (Art. I, Sec. 8, cl. 3). Defendants seek summary judgment on both grounds.

I. PREEMPTION

Plaintiff Federal Express argues that the CPUC regulations are barred by 1) express preemption, 2) implied preemption where Congress intended to occupy the field, and 3) conflict preemption where state law clashes with Congress' objectives, even if Congress did not intend to occupy the field. *See, e.g., Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714-715, 105 S.Ct. 2371, 2375-2376, 85 L.Ed.2d 714 (1985) (summarizing preemption case law). Where state regulatory powers are challenged, courts must presume that state laws are

not preempted unless preemption is shown to be the clear purpose of the Congress. *See, e.g., Pacific Legal Foundation v. Staff Energy Resources Conservation and Dev. Comm'n,* 659 F.2d 903, 919 (9th Cir.1981), *aff'd,* 461 U.S. 190, 206, 103 S.Ct. 1713, 1723, 75 L.Ed.2d 752 (1983) (courts assume that states' police powers take precedence unless Congress clearly demonstrated contrary intent). The burden of proof therefore falls on those arguing that state laws are preempted, so plaintiff must bear that burden.

A. Express Preemption

Plaintiff contends that 49 U.S.C.App. § 1305(a) expressly prohibits the CPUC regulation of Federal Express. This section states:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Whether this section preempts CPUC regulation of intrastate ground transport turns on the meaning of two phrases: "relating to" and "rates, routes, and *services.*" Federal Express asserts that its groundbased routes are services within its integrated air-ground transportation system. Invoking the plain meaning rule of statutory construction, defendants counter that the intrastate trucking operation of Federal Express is not covered by the language of section 1305(a).

In a similar case, the Ninth Circuit rejected an expansive reading of the term "services." *Air Transport Ass'n v. Public Utilities Comm'n of California,* 833 F.2d 200, 207 (9th Cir.1987), *cert. denied,* ____ U.S. ____, 108 S.Ct. 2904, 101 L.Ed.2d 936 (1988) (section 1305(a) does not preempt CPUC regulation prohibiting recording of telephone conversations without warning). The Ninth Circuit reasoned that:

> The type of telephone operations utilized by the airlines is not peculiar to airlines and is similar to those operations used

> by other national service industries where reservations are required, such as hotels and motels, and car rental companies

Id. Thus, telephone reservation operations are not services within the meaning of section 1305(a). *Id. Compare, e.g., Hingson v. Pacific Southwest Airlines,* 743 F.2d 1408, 1415 (9th Cir.1984) (air carrier seating policies for handicapped passengers held to be "services" and therefore preempted by section 1305(a)).

Plaintiff has failed to satisfy the *Air Transport Association* test since it has not shown that Federal Express intrastate trucking operations are singularly *airline* services. Although Federal Express' ground operations are commercially linked to its air transportation system, its hauling operations are not substantially different from services provided by other motor carriers.

Plaintiff also argues that the ground transportation services "relate to" the air transportation provided by Federal Express, analogizing to the Supreme Court's broad interpretation of ERISA preemption of any state laws which "relate to" any employee benefit plan. 29 U.S.C. § 1144(a). *See, e.g., Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 47-48, 107 S.Ct. 1549, 1552-1553, 95 L.Ed.2d 39 (1987). However, this reading of ERISA preemption should not be taken as a canon of general statutory interpretation. The legislative history of ERISA indicates that Congress specifically intended a broad reading of preemption in that context. *Pilot Life,* 481 U.S. at 45-46, 107 S.Ct. at 1551-1552 (citations omitted). Plaintiff cites no comparable legislative history concerning section 1305(a). It is true, however, that the legislative framework of section 1305(a), the Airline Deregulation Act of 1978, was aimed at creating "comprehensive legislation" to supply "a gradual and phased transition to a deregulated system." *Hughes Air Corp. v. Public Utilities Comm'n,* 644 F.2d 1334, 1337 (9th Cir. 1981) (citation omitted).

Even assuming *arguendo* that the phrase "relating to" should be read expansively, plaintiff's position is problematic. The court has found no cases in which the phrase "relating to" in this section has been applied to regularly conducted ground transpor-

tation.[1] *Compare, e.g., Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C.Cir. 1987) (state law requirement of courteous service on airplane preempted by section 1305(a)). Under the interpretation urged by Federal Express, virtually any air carrier-owned or operated service would escape state regulation if it established the slightest nexus between its various activities.[2] The court declines to strain such a reading from section 1305(a).

B. Implied Preemption

In order to show that the Airline Deregulation Act of 1978 impliedly preempts CPUC regulations, plaintiff must offer "evidence of a congressional intent to pre-empt the specific field covered by the of state law." *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 6, 106 S.Ct. 2369, 2372, 91 L.Ed.2d 1 (1986) (state sales taxation of airline fuel not preempted by Federal Aviation Act). The Act expressed the legislative intent that the aviation industry be permitted to develop and grow competitively in response to market forces. 49 U.S.C.App. § 1302(b). Plaintiff cites the following language from the policy declaration preceding the Act:

> (1) The encouragement and development of an expedited all-cargo air service system, provided by private enterprise, re-

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[1] Federal Express also relies on regulations issued by the Civil Aeronautics Board (now enforced by the Department of Transportation) to support its argument that section 1305(a) preempts a broad range of air carrier activities. Nothing in those regulations suggests that ground transportation is covered. In particular, to read the exemption for "mode of operations" in 14 C.F.R § 399.110(d) as including Federal Express trucks distorts the regulatory language.

[2] At the hearing plaintiff's counsel admitted that he could not draw the line at which a business with both air and ground transportation services would qualify within the interpretation of "all-cargo system" urged by Federal Express. In response to the court's questioning, plaintiff's counsel sought to distinguish Federal Express from a hypothetical business certified as an air carrier where over 50% of its revenues derived from ground transportation. Yet plaintiff's counsel declined to specify the point at which such business would become an "integrated transportation system" in the parlance of Federal Express.

sponse to (A) the present and future needs of shippers, (B) the commerce of the United States, and (C) the national defense.

(2) The encouragement and development of an integrated transportation system relying upon competitive market forces to determine the extent, variety, quality and price of such services.

49 U.S.C.App. § 1302(b). Plaintiff urges the court to find that by using phrases such as "all-cargo air service system" and "integrated transportation system," Congress intended to include Federal Express' ground transportation activities.

Neither the definitional framework of the Act nor its legislative history supports such an argument. An "all-cargo air service system" is defined in the statute simply as "the carriage by aircraft in interstate or overseas air transportation of only property or mail, or both." 49 U.S.C.App. § 1301(11). As to the notion of an integrated transportation system, the only language that might pertain to ground transportation is found in the definitions of "interstate air transportation" and "interstate air commerce" which include the movement of commerce in part by aircraft and in part by "other forms of transportation." *Id.* § 1301(23) & (24). Here, however, the CPUC is not attempting to regulate ship ments of Federal Express in which intrastate ground transportation is combined with air transport. Rather, it is attempting to regulate shipments which involve only the intrastate ground transportation. Hence, these statutory definitions are not implicated.

In the many pages of Congressional reports accompanying the Airline Deregulation Act no mention is made of ground transportation activities, while repeated references are made to air transportation and flights. *See, e.g.*, H.Rep. No. 95-1211, 95th Cong., 2nd Sess. 15-16, *reprinted in* 1978 U.S.Code Cong. & Admin.News 3737, 3751-3752 (discussing preemption); H.Conf.Rep. No. 95-1779, 95th Cong., 2nd Sess. 94-95, *reprinted in* 1978 U.S.Code Cong. & Admin.News 3773, 3804-3805 (discussing preemption).

Proponents of the Airline Deregulation Act of 1978 declared that Congress intended to prevent the states from regulating air

transportation. *See Hughes Air Corp.*, 644 F.2d at 1336-1337 (discussing legislative history of Airline Deregulation Act). In 1984, Congress expanded the reach of the Act by amending the preemption clause to replace the words "interstate air transportation" with "air transportation." *See* 49 U.S.C.App. § 1305(a)(1) (Supp. III 1985) (amending 49 U.S.C.App. § 1305(a)(1)).

Furthermore, other post-1978 legislation indicates that Congress did not intend the federal government to occupy the field of intrastate ground transportation. Numerous amendments to the Interstate Commerce Act, 49 U.S.C. § 10101 et seq., including the Motor Carrier Act of 1980, Pub.L. 96-296, 94 Stat. 793, and the Bus Regulatory Reform Act of 1982, Pub.L. 97-261, 96 Stat. 1102, have allowed regulation of intrastate motor travel to remain in the hands of the states. The Airline Deregulation Act explicitly provides that, with narrow exceptions, the "power of a State to regulate intrastate transportation provided by a motor carrier" is not diminished by the grant of jurisdiction to the Interstate Commerce Commission ("ICC") to regulate interstate motor transportation. 49 U.S.C. § 10521(b)(1).[3]

Plaintiff has presented no evidence to demonstrate that Congress viewed Federal Express as an "integrated air-ground system" whose operations should be considered under the single rubric of air carrier. While such legislative understanding may be

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[3] *Interstate Commerce Comm'n v. Texas*, 479 U.S. 450, 107 S.Ct. 787, 93 L.Ed.2d 809 (1987) cited by plaintiffs, is easily distinguishable from the case at bar. There the Supreme Court held that the Interstate Commerce Commission (hereinafter "ICC") had authority to exempt from state regulation the motor freight portion of an intrastate "intermodal" movement of goods (an intermodal movement allows a carrier to transport a trailer and its goods over rail on a flatcar and then to haul the trailer on the highway). 479 U.S. at 460-61, 107 S.Ct. at 793 (interpreting 49 U.S.C. § 10505(f)). The parties had not disputed that the same provision gave the ICC authority to exempt the rail freight part of the journey from state regulation. *Id.* at 452, 107 S.Ct. at 789.

Here the CPUC is not seeking to regulate "intermodal" transportation. Additionally, plaintiff does not rely on an exemption order authorized by the regulatory authority of a federal agency.

short-sighted, correction must be sought from Congress, not the courts.

C. Conflict Preemption

Finally, plaintiff argues that the CPUC's regulation of Federal Express' intrastate activities conflicts with the objectives and goals of the Act. The court must construe the Airline Deregulation Act to avoid conflict with other legislation in the transportation field. *Cf. Louisiana Public Service Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 370, 106 S.Ct. 1890, 1899, 90 L.Ed.2d 369 (1986) (reconciling different jurisdictional provisions and finding that Congress created dual regulatory system for telephone service). One key to Congressional thinking on this matter is the Interstate Commerce Act which deprives the Interstate Commerce Commission of jurisdiction over certain motor carriers when air transport is also involved. For example, where transportation of property by motor carrier is part of a continuous movement involving air transportation, the ICC does not have jurisdiction. 49 U.S.C. § 10526(a)(8)(B). However, the exemption does not extend to motor carrier service of an air carrier. It is limited to those goods actually transported by joint air and ground carriage. Another example found in the same section is the exemption of motor carrier transportation when used as a substitute for air transportation in emergency situations. *Id.* § 10526(a)(8)(C).

These exemptions suggest that Congress viewed ground and air transportation as belonging to two different regulatory regimes under normal circumstances. The Interstate Commerce Act further demonstrates that Congress intended to specify when motor carrier transportation was to be seen as an adjunct to air transportation and therefore exempt from the ICC's jurisdiction. *See, e.g.*, 49 U.S.C. § 10526(a)(8)(A) (removing from ICC jurisdiction "transportation of passengers by motor vehicle incidental to transportation by aircraft").

For the reasons articulated above, the court finds that under the Interstate Commerce Act, Congress contemplated a multi-layer system of transportation regulation. The court therefore finds that

CPUC regulations do not conflict with federal legislation in the transportation field.

II. BURDEN ON INTERSTATE COMMERCE

Plaintiff also contends that the CPUC regulations are an unconstitutional burden on interstate commerce, prohibited by the Commerce Clause (Art. I, § 8, cl. 3). The legal test for determining the validity of state statutes that affect interstate commerce is set forth in *Pike v. Bruce Church Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142, 90 S.Ct. at 847; *see also Burlington Northern R.R. Co. v. Dep't of Public Service Regulation*, 763 F.2d 1106, 1114 (9th Cir.1985) (challenger to state regulation must show that it "impedes substantially the free flow of commerce from state to state").

Federal Express contends that enforcement of the CPUC regulations will place an unreasonable burden on interstate commerce because the regulations will increase operating costs, result in delays in delivery times and reduce operating, pricing and discount flexibility. The CPUC counters that Federal Express' scenario of burdens is unfounded and that CPUC regulation of Federal Express would be reasonable and tailored to Federal Express' existing method of operation.

Much of Federal Express' Commerce Clause analysis is premised on its contention that it cannot determine at the time of package pick-up whether a package from a location in California will move solely by ground transportation or partially by air. Federal Express contends that this inability to separate packages

before shipment will require Federal Express to comply with the CPUC regulations for all California shipments, even those which will not be delivered solely by intrastate ground carrier.

As the parties have not fully explored the burden on interstate commerce which would result from a post-shipment estimate of the packages which have traveled solely by truck in California, the court declines to grant summary judgment. The court directs the parties to conduct additional discovery, if warranted, and file supplemental pleadings addressing the factual issues raised by the court.

Specifically, the parties are directed to address whether or not Federal Express can identify, *after* packages have been shipped, those packages that have traveled solely by truck in California. Federal Express concedes that such post-shipment scanning is conceivable. *See* Lawrence Decl. at para. 8. Counsel for the CPUC, in oral argument on September 26, 1988, stated that the CPUC will accept estimates of the number of packages shipped by Federal Express solely by ground transportation in California in order to assess quarterly transportation rate fund fees. *See also* Smith Dec. at para. 8.

Whether the CPUC regulations would pose an unreasonable burden on interstate commerce under such an estimate system has been not been addressed by the parties. Consequently, the parties are hereby directed to address whether the CPUC regulations would pose an unreasonable burden on interstate commerce if Federal Express were required to estimate the number of packages which have traveled solely in intrastate commerce. In addition, the CPUC is directed to address in greater detail the public benefits to be realized from the CPUC regulations challenged herein.

Plaintiff and defendant are hereby ordered to file declarations or other evidentiary submissions addressing the issues discussed above. In relation to those issues the parties may file supplemental memoranda of no more than ten (10) pages in length. These papers shall be filed within sixty (60) days of the date of this order. No replies shall be filed.

CONCLUSION

Plaintiffs have failed to carry their burden of proof with regard to the preemption argument. On the other hand, defendants have shown that the CPUC regulations were not barred by the Supremacy Clause. Defendants are hereby granted partial summary judgment on the issue of preemption. The parties' motions for summary judgment on the burden on interstate commerce issue are denied, and the parties are directed to file supplementary pleadings in accordance with this order.

IT IS SO ORDERED.

APPENDIX C

FEDERAL EXPRESS CORP.,
Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.,
Defendants.

No. C-87-4891 MHP.

United States District Court,
N.D. California.

Oct. 11, 1989.

SUPPLEMENTAL OPINION

PATEL, District Judge.

Plaintiff, a nationwide small package express delivery service, brought this action seeking a declaration that California Public Utilities Code §§ 486-496 are unconstitutional as an impermissible burden on interstate commerce under the Commerce Clause and as preempted by the Airline Deregulation Act ("the Act"), 49 U.S.C. App. § 1305. Plaintiff also seeks an injunction preventing defendants from enforcing regulations promulgated pursuant to state statutory authority. By order of March 30, 1989, the court granted defendants' motion for summary judgment with respect to the preemption issue and ordered additional briefing on the burden on interstate commerce issue. 716 F.Supp. 1299 (N.D.Cal.1989).

The case is now before the court on cross-motions for summary judgment. Having considered the submissions of the parties, for the following reasons, the court grants defendants' motion for summary judgment on the interstate commerce issue.

BACKGROUND

The factual background of this case was discussed extensively in the court's order of March 30, 1989, and is not repeated here. Briefly stated, the remaining issue is whether or not California Public Utilities Code ("CPUC") regulations governing the portion of Federal Express business which is conducted intrastate

and solely by truck unconstitutionally burden interstate commerce. The challenged regulations apply to areas including financial reporting, capitalization, insurance and safety.

In its order of March 30, the court asked the parties to address three questions: 1) whether Federal Express can identify, after packages have been shipped, those packages that have traveled solely by truck in California; 2) whether the CPUC regulations would pose an unreasonable burden if Federal Express were required to estimate the number of packages which have traveled solely in interstate commerce; and 3) which public benefits derive from the CPUC regulations at issue.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). *See also T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987) (if the moving party meets its initial burden of demonstratingthe absence of any genuine issue of material fact, the nonmoving party may not rely on the pleadings but must present specific facts creating a genuine issue of material fact); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

The court's function, however, is not to make credibility determinations. *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513-14. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W. Elec. Serv.*, 809 F.2d at 631.

DISCUSSION

When state regulations arguably affect commerce among states, the Commerce Clause of the United States Constitution (Art. I, § 8, cl. 3) is implicated. Federal Express argues that the application of CPUC regulations to its intrastate ground operations places an unconstitutional burden on interstate commerce in violation of the Commerce Clause. If a regulation operates evenhandedly and creates only incidental effects upon interstate commerce, it passes constitutional muster unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L.Ed.2d 174 (1970); *see also Burlington N.R.R. Co. v. Dep't of Pub. Serv. Regulation*, 763 F.2d 1106, 1114 (9th Cir.1985) (challenger to state regulation must show that it "impedes substantially the free flow of commerce from state to state").

A. Burdens Imposed by the CPUC Regulations

Federal Express contends that enforcement of the CPUC regulations will place an unreasonable burden on interstate commerce because the regulations will increase operating costs, result in delays in delivery times and reduce operating, pricing and discount flexibility. The CPUC counters that Federal Express' scenario of burdens is unfounded and that CPUC regulation of Federal Express is reasonable and tailored to Federal Express' existing method of operation.

First, Federal Express asserts that it cannot determine at the time of package pick-up whether a package from a location in California will move solely by ground transportation or partially by air. According to plaintiff, this inability to segregate packages before shipment will require it to comply with the CPUC financial and other requirements for all California shipments, even those which do not travel only by intrastate ground transportation. It further contends that its "state of the art" tracking system does not enable it to collect information regarding the mode(s) of transportation taken after packages are delivered. Lawrence Supp.Dec. paras. 3, 5-6; Nehls Dec. paras. 3-4. However, an earlier declaration submitted by plaintiffs indicated that "it is

conceivable to scan trucks which are unloading to record which packages were in a truck." Lawrence Dec. para. 5. This declaration also stated that Federal Express was planning to change its system to allow tracking of truck routes. *Id.* para. 6.

Plaintiff now asserts that the development of post-delivery scanning which would identify transportation modes will require several years of research and the expenditure of an estimated $10-20 million. Lawrence Supp. Dec. para. 6; Nehls Dec. para. 4 (stating that under current system post-transportation scanning would not provide accurate data). Federal Express also states that post-delivery scanning would slow down services. Lawrence Supp. Dec. para. 6; Nehls Dec. para. 3. Although defendants doubt the accuracy of Federal Express' representations on this issue, they offer no evidence that the declarations are false or inaccurate. Since the record is uncontradicted, the court accepts as true plaintiff's assertions concerning the difficulty of post-delivery scanning under the current system.

Second, the parties addressed the feasibility of Federal Express providing the CPUC with estimates of packages and the mode of transportation, and paying fees in accordance with this arrangement. Plaintiff argues: 1) that estimating the number of packages that are carried by ground transportation within California would not relieve Federal Express of the burden of other CPUC general orders and regulations and 2) that Federal Express cannot be assured that CPUC will not refuse to accept estimates in the future.

As to the second contention, the court notes that counsel for the CPUC, at the hearing on September 26, 1988, stated that the CPUC will accept estimates of the number of packages shipped by Federal Express solely by ground transportation in California in order to assess quarterly transportation rate fund fees. Indeed, during the calendar years 1985 and 19S6 and through the first quarter of 1987, Federal Express paid quarterly operating fees to the CPUC under a formula arrived at by the CPUC and apparently agreed to by the plaintiff. Diani Aff. paras. 7, 14 and Exs. B-E appended thereto. These fees were paid by Federal Express and accepted by the CPUC on the basis of estimates. Furthermore, the payment of these estimated fees apparently did not

jeopardize plaintiff's profits. During the period when Federal Express paid estimated quarterly fees to the CPUC, its revenues increased steadily in California and throughout the United States (with the exception of a small decline in California revenues in the first quarter of 1987). *Id.* para. 15 and Ex. D attached. The method of allowing Federal Express to pay estimates thus appears to have worked reasonably well in the past. Since there is no dispute that the CPUC will now allow Federal Express to pay estimated fees, the court need not speculate whether such arrangements will be permitted in the future.[1]

Plaintiff also argues that paying estimated taxes would not relieve it of the unreasonable burden imposed by other PUC orders governing its operations such as rates, rate changes, refunds, and claims procedures. See Tucker, Bledsoe, Lawrence, Christensen, Allen, Sherman, Germano and McNeal Decs.; Plaintiff's Supp. Memo, Ex. 4H. According to plaintiff, Federal Express cannot segregate packages flown by air from those carried by Luck. Plaintiff declares that, even if Federal Express could separate packages according to the type of transportation used, it would not be feasible to distinguish between packages carried across state lines and those transported only within California. Federal Express depicts a scenario in which CPUC regulations would force the corporation to assume that all packages, whether carried by air or by ground, or across state lines or within California, qualify for CPUC regulation. Such action allegedly would impinge upon interstate commerce by forcing uniformity across the states.

Federal Express' picture must be moderated by a touch of realism. Plaintiff contends that five different general orders issued by the CPUC affect its intrastate truck operations. With regard to

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[1] Plaintiffs protest that the CPUC policies have not been consistent, but the court finds that an prediction of future harm is entirely speculative at this point. Thus, any claim advanced by plaintiffs premised on the possibility that CPUC may reject estimates in the future does not meet the case or controversy requirement of Article III of the United States Constitution. *See, e.g., O'Shea v. Littleton,* 414 U.S. 488, 94 S.Ct.669, 38 L.Ed.2d 674 (1974) (discussing ripeness).

at least one order, the rate justification provision, the CPUC has allowed Federal Express to charge rates for intrastate carriage within California that are identical to its other rates. Defendants' Supp. Memo, Attachment 2 at 2, 9-10. The CPUC asserts that it will grant variances for the cost justification requirements as well as the other general orders to which Federal Express objects. *Id.* at 2-10.

Federal Express relies on *Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. 573, 582 n. 5, 106 S.Ct. 2080, 2086 n. 5, 90 L.Ed.2d 552 (1986) and *In re Beer Institute*, 849 F.2d 753, 760 (2d Cir.1988), *aff'd sub nom. Healy v. Beer Institute*, ____ U.S. ____, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) for the proposition that constitutional rights cannot be made dependent on the discretion of a state agency. However, *Brown-Forman* and *Healy* involved entirely different facts than are presented here. In *Brown-Forman* the Court struck down a New York liquor statute which required that every producer affirm that the prices charged for every bottle of liquor sold in New York did not exceed that charged in any other state during the same month. 476 U.S. at 582-583, 106 S.Ct. at 2086. *Healy* invalidated the Connecticut statute which contemporaneously controlled liquor prices relative to other states, and which restricted a brewer's ability to offer volume discounts. 109 S.Ct. at 2502-2503. In both *Brown-Forman* and *Healy*, the Court invalidated liquor statutes because their regulation of liquor prices had an extraterritorial effect and produced a pricing gridlock on a regional and even national level. *See Healy*, 109 S Ct. at 2501-2503 (discussing unconstitutional effects).

Healy articulates a three part test for evaluating the extraterritorial effect of state regulation: 1) whether the state statute applies to commerce wholly outside the state's borders; 2) whether a statute has the "practical effect" of controlling conduct outside a state's borders; and 3) how the statute affects legitimate regulations imposed by other staffs, and what impact would be created if other states enacted similar legislation. 109 S.Ct. at 2499. Applying this test to the instant case, the court finds that the CPUC regulations do not apply to commerce outside California, nor has there been any evidence that CPUC

regulations will have the practical effect of controlling commerce outside California. Plaintiff has made no showing that CPUC regulations will conflict with other states' regulations, nor is there any suggestion that the CPUC regulations will create an economic gridlock in the transportation industry.[2]

One further distinction merits discussion. In *Healy*, the Court also found the Connecticut statute unconstitutional because the liquor statute applied only to brewers engaged in interstate commerce. 109 S.Ct. at 2501. Here the opposite situation is true: the CPUC is attempting to regulate the intrastate ground operations of Federal Express in the same manner that it currently regulates other intrastate ground transportation. Rather than seeking equal treatment with intrastate companies, Federal Express is actually seeking more favorable treatment than is received by those carriers operating solely in California.

As to the contention that variances (which plaintiffs prefer to call exemptions) will not necessarily be forthcoming from the CPUC, it is not clear whether such variances were previously granted when Federal Express was paying estimated quarterly fees. Moreover, plaintiffs have presented no concrete evidence of harm that would result if such variances were not given.

B. Benefits of CPUC Regulations

Against this meager showing of burdens resulting from the CPUC regulations, the court balances the benefits allegedly derived from the regulation. Federal Express contends that the regulations provide no public benefits. To support this position, it cites testimony before the CPUC and a CPUC staff report expressing the need to reform the California regulatory system to benefit the ratepayers.

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[2] With respect to other state statutes and regulations, including those administered by the CPUC, the supplemental summaries submitted by the parties show these requirements do not unreasonably burden interstate commerce. Many of the regulations are similar to or less onerous than comparable federal regulations. Others impose burdens only to the extent that the activities are intrastate. In the latter case, the regulations go to matters ordinarily left to state regulation, such as driver safety, vehicle safety, and protection of state citizens' interests.

On the other hand, the CPUC asserts that its regulations help protect consumers, promote highway safety, and benefit the state economy. Smith Aff. They also stress that in 1988 the California legislature gave the CPUC greater responsibility for monitoring vehicle maintenance and driver qualifications. Cal.Pub.Util.Code §§ 1063.5, 3553, 3557 (West Supp. 1989). Moreover, the CPUC points out that the payment of quarterly fees finances its highway safety and maintenance programs.

Plaintiff's evidence does not tend to show that the CPUC regulations provide no public benefit, nor that its functions are merely superfluous.[3] As demonstrated by the above legislation, the California state legislature clearly views CPUC enforcement of safety regulations as a significant public benefit. Furthermore,

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[3] For instance, plaintiff attempts to rely upon excerpts from the proposed Decision of the Administrative Law Judge in the Regulation of General Freight Transportation by Truck. No. I.88-08-046. *See* Plaintiff's Letter Brief, dated July 3, 1989 (containing excerpts from Proposed Decision). The proposed decision recommends flexibility in rate regulation, Proposed Decision at 80, and states that "the most effective way to improve safety is through direct safety regulation and enforcement." *Id.* at 58-59. On the other hand, the proposed decision also states that, while other state agencies bear direct responsibility for safety regulation, the CPUC "has an indirect, but equally important, role of cooperating with these agencies when Commission regulated carriers are involved" *Id.* at 63. The functions CPUC shares with other state agencies include: 1) suspending or revoking unsafe carriers' operating authority; 2) listing carrier equipment; and 3) listing owner-operators and drivers, licenses. *Id.*

Furthermore, the organizational charts submitted by both parties indicate that there is considerable coordination between the CPUC and state agencies such as the California Highway Patrol (CHP) and the Department of Motor Vehicles, as well as between CPUC and the Interstate Commerce Commission. However, the summaries show in many instances that the CPUC does not duplicate, but complements activities of these other agencies. *See, e.g.*, Cal. Pub.Util.Code § 3631.5 (requiring liability insurance for motor carriers hauling hazardous materials, who have been licensed by the CHP); Cal.Pub.Util.Code § 3553 (requiring new holders to show that they can meet CHP safety standards).

the United States Supreme Court has noted that "the question of safety . . . is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives." *Bhd. of Locomotive Firemen and Eng'rs v. Chicago, Rock Island and Pacific R.R. Co.*, 393 U.S. 129, 138 89 S.Ct. 323, 328, 21 L.Ed.2d 289 (1968) (upholding numerical requirements for train crew members against Commerce Clause and equal protection challenge).

Additionally, in *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978), the Supreme Court declared:

> [T]he Court has been most reluctant to invalidate under the Commerce Clause "state legislation in the field of safety where the propriety of local regulation has long been recognized." . . . In no field has this deference to state regulation been greater than that of highway safety regulation. . . . Thus, those who would challenge state regulations said to promote highway safety must overcome a "strong presumption of [their] validity."

Id. at 143-44, 98 S.Ct. at 795 (citations omitted).[4]

In the instant case, the court finds that plaintiffs have not overcome the strong presumption of the validity of the CPUC regulations.

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[4] State highway regulations merit special deference because the burden of nondiscriminatory regulations generally falls on local economic interests, and because the states bear primary responsibility For policing highway conditions. *Raymond Motor Transp.*, 434 U.S. at 444 n. 18, 98 S.Ct. at 795 n. 18. Nevertheless, in *Raymond Motor Transp.*, the Court invalidated Wisconsin's regulations governing the length and shape of trucks. The Court found uncontradicted evidence that the regulations did not contribute to highway safety and concluded that the regulations significantly raised costs, slowed transportation, and prevented transfers from any of the thirty-three states where the prohibited trucks were legal. *Id.* at 444-445, 98 S.Ct. at 795-96. The record here is completely lacking in such evidence, regarding both the burdens and benefits of the regulations.

CONCLUSION

Plaintiffs have failed to carry their burden of proof with regard to their interstate commerce argument. On the other hand, defendants have shown that the CPUC regulations do not constitute an unreasonable burden. Defendants are therefore GRANTED summary judgment on the interstate commerce clause issue. Plaintiff's motion for summary judgment is DENIED.

There being no remaining issues, this case is hereby DISMISSED.

IT IS SO ORDERED.

APPENDIX D

U.S. Const., Art. VI, cl. 2
The Supremacy Clause

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. I, § 8, cl. 3
The Commerce Clause

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

49 U.S.C. App. § 1301(3)

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

49 U.S.C. App. § 1301(10)

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

49 U.S.C. App. § 1301(11)

(11) "All-cargo air service" means the carriage by aircraft in interstate or overseas air transportation of only property or mail or both.

49 U.S.C. App. § 1301(23)

(23) "Interstate air commerce" "overseas air commerce", and "foreign air commerce", respectively mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft or the operation or navigation of

aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any Staff of the United States, or the District of Columbia, and a place in any other Staff of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

49 U.S.C. App. § 1301(24)

(24) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any Staff of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same Staff of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any plane in a Territory or possession of the United States; or between a place in a Territory or

possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or party by aircraft and partly by other forms of transportation.

49 U.S.C. App. § 1302(b)

In addition to the declaration of policy set forth in subsection (a) of the section, the Board, in the exercise and performance of its powers and duties under this chapter with respect to all-cargo air service shall consider the following, among other things, as being in the public interest:

(1) The encouragement and development of an expedited all-cargo air service system, provided by private enterprise, responsive to (A) the present and future needs of shippers, (B) the commerce of the United States, and (C) the national defense.

(2) The encouragement and development of an integrated transportation system relying upon competitive market forces to determine the extent variety, quality, and price of such services.

(3) The provision of services without unjust discriminations, undue preferences of advantages, unfair or deceptive practices, or predatory pricing.

49 U.S.C. App. § 1305(a)

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 1371 of this title, the provisions

of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

49 U.S.C. App. § 1371(a)

No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such an carrier to engage in such transportation.

49 U.S.C. § 10521(b)

(b) This subtitle does not

(1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier;

(2) except as provided in sections 10922(c)(2) and 11501(e), authorize the Commission to Prescribe or regulate a rate for intrastate transportation provided by a motor carrier;

(3) except as provided in section 10922(c)(2) of this title, allow a motor carrier to provide intrastate transportation on the highways of a State; or

(4) except as provided in section 11503a and section 11504(b) of this title, affect the taxation power of a State over a motor carrier.

49 U.S.C. § 10526(a)(8)

(a) The Interstate Commerce Commission does not have jurisdiction under is subchapter over

(8)(A) transportation of passengers by motor vehicle incidental to transportation by aircraft;

(B) transportation of property (including baggage) by motor vehicle as part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier or (to the extent so agreed by the United States and approved by the Civil Aeronautics Board or its successor agency) by a foreign air carrier; or

(C) transportation of property by motor vehicle in lieu of transportation by aircraft because of adverse weather condition or mechanical failure of the aircraft or other causes due to circumstances beyond the control of the carrier or shipper;

49 U.S.C. § 10528

A motor carrier of property providing transportation exempt from the jurisdiction of the Commission under paragraph (6), (8), (11), (12), or (13) of section 10526(a) of this subchapter I may transport property under such paragraph in the same vehicle and at the same time as property which the carrier is authorized to transport under a certificate issued under section 10922(b) of this subtitle or under a permit issued under section 10923 of this subtitle. Such transportation shall not affect the unregulated status of such exempt property or the regulated status of the property which the carrier is authorized to transport under such certificate or permit.

Cal. Const., Art. XII, § 4

The common may fix rates and establish rules for the transportation of passengers and property by transportation companies, prohibit discrimination, and award reparation for the exaction of unreasonable, excessive, or discriminatory charges. A transportation company may not raise a rate or incidental charge except after a showing to and a decision by the commission that the increase is justified, and this decision shall not be subject to judicial review except as to whether confiscation of property will result.

Cal. Pub. Util. Code § 701

The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

Cal. Pub. Util. Code § 1061

No common carrier shall operate or cause to be operated any auto, truck, or other self-propelled vehicle not operated on rails, for the transportation of property as a common carrier for com-

pensation on any public highway in this state except in accordance with the provisions of this part.

Cal. Pub. Util. Code § 1062

The commission may do all of the following:

(a) Supervise and regulate every highway common carrier and cement carrier in this state.

(b) Fix the rates, fares, charges, classifications, and rules of each of these carriers.

(c) Regulate the accounts, and service of each of these carriers, and require the filing of annual and other reports and of other data by these carriers.

(d) Supervise and regulate these carriers in all other matters affecting the relationship between them and the shipping public.

(e) Directly or through its employees, representatives, or inspectors photocopy or electrostatically or photostatically reproduce at the commission's expense the accounts, books, papers, and documents of any of these carriers at either the premises of the carrier or the offices of the commission. A carrier may determine whether the copying or reproduction is done at its premises or at the offices of the commission, and where copying or reproduction expenses are incurred by the carrier, the commission shall, upon request, reimburse the carrier for the expenses.

The commission, by general order or otherwise, may prescribe rules applicable to any and all highway common carriers and cement carriers. The commission, in the exercise of the jurisdiction conferred upon it by the California Constitution and by this part, may make orders and prescribe rules affecting highway common carriers and cement carriers, notwithstanding the provisions of any ordinance or permit of any city, city and county, or county, and in case of conflict between its order or rule and any ordinance or permit of a city, city and county, or county, the order or rule of the commission shall prevail.

Cal. Pub. Util. Code § 1063(a)

(a) No common carrier shall begin to operate any motor vehicle, for the transportation of property for compensation on any public highway in this state without first having obtained from the commission a certificate declaring that public convenience and necessity require that operation. No certificate shall be required of any highway common carrier for the performance of pickup, delivery, or transfer services by the carrier within the carrier's lawfully published pickup and delivery zones insofar as the pickup and delivery limits do not include territory in excess of three miles from the corporate limits of any city or three miles from the post office of any unincorporated point.

Cal. Pub. Util. Code § 1070

(a) The commission may, at any time, for a good cause, suspend, and upon notice to the holder of a certificate, and upon opportunity to be heard, revoke, alter, or amend, that certificate.

(b) As an alternative to the suspension, revocation, alteration, or amendment of a certificate pursuant to subdivision (a), the commission may impose upon the holder of the certificate a fine of not exceeding five thousand dollars ($5,000) for a first offense and not exceeding twenty thousand dollars ($20,000) for any second or succeeding offense. The common may assess interest upon any fine imposed, the interest to commence upon the day the payment of the fine is delinquent. All fines and interest collected shall be deposited at least once each month in the State Treasury to the credit of the General Fund.

(c) For purposes of this section, "good cause" includes, but is not limited to, a consistent failure of the holder of the certificate to maintain vehicles in a safe operating condition and in compliance with the Vehicle Code and with regulations contained in Title 13 of the California Administrative Code relative to motor vehicle safety, as shown by the records of the commission, the Department of the California Highway Patrol, or the common carrier.

Cal. Pub. Util. Code § 3502

The use of the public highways for the transportation of property for compensation is a business affected with a public interest. It is the purpose of this chapter to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without necessary congestion or wear and tear upon such highways; to secure to the people just and reasonable rates for transportation by carriers operating upon such highways; and to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable public demands by providing for the regulation of rates of all transportation agencies so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public. It is the further purpose of this chapter to eliminate, so far as reasonably possible, the excessive use of highways that has resulted from excessive crosshauling of portland and similar cements which has heretofore pertained, when they are hauled in a motor vehicle or motor vehicles loaded substantially to capacity with such commodity or commodities, since these commodities move in great volume in vehicles that are loaded substantially to the permissible gross weight limited provided by the Vehicle Code.

Cal. Pub. Util. Code § 3502.1

The Legislature finds and declares that it is the policy of this state to achieve increasingly efficient utilization of energy in the performance of transportation services by highway carriers.

Cal. Pub. Util. Code § 3541

No highway permit carrier shall engage in the business of the transportation of property for compensation by motor vehicle over any public highway in this state, except in accordance with the provisions of this chapter which is enacted under the power of the state to regulate the use of public highways.

Cal. Pub. Util. Code § 5003.1

Every railroad corporation, express corporation and freight forwarder, as these terms are defined in Part 1 (commencing with Section 201) of Division 1, and every motor transportation broker,

as defined in Section 4803, and every person or corporation owning or operating motor vehicles in the transportation of property for hire upon the public highways under the jurisdiction of the commission shall, between the first and 15th days of January, April, July, and October of each year, file with the commission a statement showing the gross operating revenue derived by that person or corporation from the transportation of property for the preceding three calendar months, and shall, at the time of filing the report, pay to the commission a fee of ten dollars ($10) for each quarter. Every express corporation, freight forwarder, motor transportation broker, and every person or corporation owning or operating motor vehicles in the transportation of property for hire upon the public highways under the jurisdiction of the commission shall, at the time of filing the report, pay to the commission a fee equal to one-third of 1 percent of the amount of the gross operating revenue, except as follows:

(a) For any particular fiscal year, the commission, with the approval of the Department of Finance, may fix the fee at less than one-third of 1 percent of that amount.

(b) The commission may increase the fee pursuant to subdivision (b) of Section 5003.2.

Appendix E

Decision 90-02-021

February 7, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Regulation
of General Freight Transportation by Truck.

I.88-08-046
(Filed August 24, 1988)

ORDER MODIFYING DECISION 89-10-039,
GRANTING LIMITED HEARING,
DENYING REHEARING IN ALL OTHER RESPECTS,
LIFTING STAY,
AND DENYING PETITION FOR MODIFICATION OF
D.89-10-039

On October 12, 1989, we approved Decision (D.) 89-10-039 (the Decision), our Decision on Rate, Safety, and Subhaul Regulation for General Freight Transportation. The Decision was to become effective in 30 days. However, the California Teamsters Public Affairs Council and the California Trucking Association (CTA) filed applications for rehearing sufficiently in advance of the Decision's effective date to secure an automatic stay of the Decision pursuant to Public Utilities Code § 1733(a). Three additional applications for rehearing were also timely filed: one by Willig Freight Lines, one by the Ad Hoc Carriers Committee, and one by the California Coalition for Trucking Deregulation and Viking Freight System, Inc. (Coalition/Viking). CTA filed a response to the Coalition/Viking application. National Small Shipments Traffic Conference, Inc. and the Health and Personal Care Distribution Conference, Inc. (NSSTC) also filed a reply to the applications for rehearing.[1] On December 18, 1989, Lou

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[1] Pursuant to Commission policy and Rule of Practice and Procedure 87, the Assistant General Counsel in charge of reviewing applications for rehearing, for good cause shown, granted NSSTC permission to file its reply after the period provided for in Rule 86.2 had expired.

Filipovich (Filipovich) filed a petition for modification of the Decision. On that same date, in D.89-12-054, we extended the stay of the Decision pending further order of the Commission, in order to provide sufficient time to carefully consider the numerous allegations raised in the lengthy applications for rehearing.

We have now completed our review of the applications for rehearing, the replies, and the petition for modification and are prepared to respond to them. But first, we wish to comment on the applications, particularly the application of CTA. CTA's application for rehearing was 180 pages long. In light of its repetitious and often pointless arguments, this length was excessive. Moreover, despite the length of its application, CTA made many vague references to the record, claiming that there was unrebutted evidence in the record concerning various points without citing to any particular exhibit or transcript page. (See, e.g., CTA's application at 56, 119.) Our Rule of Practice and Procedure 86.1 provides that:

> Applications for rehearing shall set forth specifically the grounds on which applicant considers the order or decision of the Commission to be unlawful or erroneous. Applicants are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention.

We have dealt with the applications for rehearing of the Decision in accordance with Rule 86.1. (See also Public Utilities Code § 1732).

Having carefully considered each of the issues and arguments raised in the applications for rehearing, we are of the opinion that the Decision should be modified in several respects. In response to criticisms of the Decision's variable cost floor, we have reconsidered the need for, and the appropriate method of calculating, this floor. Based on our review of the evidence, our legal analysis, and due consideration of the arguments of the various applicants for rehearing and those filing responses, we have decided: (1) that this floor should apply only to common carriers, and (2) that we will use, at least on an interim basis, the minimum wage, rather than carrier-specific calculations, to determine the driver labor component of the variable cost floor. We explain the reasons for

adopting these aspects of our general freight program in a Modified Decision attached hereto.[2]

We remain committed to the concept of a variable-cost floor price for common carriers as a part of our new general freight program. And we do not wish to delay implementation of this program. Accordingly, the Modified Decision adopts a variable cost floor that we will implement at the earliest possible date, at least on an interim basis.[3] However, in light of the considerable concern expressed about how the variable cost floor ought to be calculated, we will grant a limited rehearing to consider: (1) comments on our adopted, interim variable-cost floor price, and (2) any alternative proposals for determining a variable-cost floor for common carriers. At this limited rehearing we will also consider how the figures used in calculating the variable cost floor can be updated from time to time. This rehearing will not reconsider whether a variable-cost floor ought to be the rate floor for common carriers. In the meantime, we will proceed to implement the variable cost floor as adopted in the attached Modified Decision.

We have carefully considered each of the issues and arguments raised in the applications for rehearing and are of the opinion that sufficient grounds for granting rehearing have not been shown, other than to the extent outlined above. Accordingly, we will lift our prior stay of the Decision. We are, however, of the opinion that the Decision should be modified in several additional respects. Many of these changes are intended to better explain our new general freight program and why we are adopting it. Other changes just involve fine-tuning in the details of General Order 147-B. We will not here recapitulate all of the changes we are

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[2] Rather than including in this decision line-by-line modifications to the original Decision, we are attaching to this decision a complete version of D. 89-10-039 as modified today (the Modified Decision). This consolidated document will make it easier for all those affected to understand our new general freight program.

[3] We are making the General Orders that implement our new program effective March 15, 1990, to allow sufficient time for printing and distribution of the Modified Decision and the General Orders.

making in the Decision and its accompanying General Orders. They appear in the attached Modified Decision.

In its application for rehearing, CTA alleges that the Commission must prepare an Environmental Impact Report (EIR) before implementing our new general freight program. We have previously concluded that while the policy provisions of the California Environmental Quality Act (CEQA) (Public Resources Code § 21000 et seq.) apply to ratemaking proceedings, the EIR provisions of CEQA do not. *Re: Rules of Practice and Procedure*, 75 Cal. P.U.C. 133, 142 (1973); *Peninsula Commute and Transit Committee*, 75 Cal. P.U.C. 243 (1973). The Decision implements a new system for regulating the rates of general freight carriers. Thus, this is a ratemaking proceeding and the EIR provisions of CEQA do not apply. The Modified Decision does consider the environmental impacts CTA alleges.

To the extent that we have neither granted limited rehearing nor modified the Decision, we are of the opinion that the arguments raised in the applications for rehearing lack sufficient merit to require any further response. To a large degree the applications for rehearing merely reargue points raised earlier and rejected in the original Decision.

We have also considered the arguments raised in the Petition for Modification filed by Filipovich. Filipovich asks us to hold the Decision in abeyance pending resolution of unresolved issues concerning subhaulers, including Filipovich's request for implementation of a mandatory rate system for subhaulers. We are unwilling to delay the needed reforms contained in the Decision until we are able to resolve the subhauler issues. On the other hand, we note that the Decision ordered additional hearings on several subhauler issues, including possible rules on the division of revenues between prime carriers and subhaulers. Accordingly, we will dismiss Filipovich's petition for modification without prejudice to his participation in those additional hearings. We will consider the proper resolution of the several subhauler issues after the conclusion of those hearings.

Conclusion of Law

The EIR provisions of the California Environmental Quality Act do not apply to a ratemaking proceeding such as this one.

Therefore, good cause appearing,

IT IS ORDERED that D.89-10-039 is modified as follows:

1. D.89-10-039 is replaced by Modified D.89-10-039, Attachment 1 hereto. More specifically Pages 1 through 139 are replaced by Revised pages 1 through 153 and Appendices C, D, and E are replaced by revised Appendices C, D, and E. Appendices A, B, and F remain unchanged. Attachment 1 hereto is a complete version of the Modified D.89-10-039 (and includes the revised General Orders and all other appendices as well).

IT IS FURTHER ORDERED that:

2. A limited rehearing is hereby granted to consider comments on the adopted variable-cost floor for common carriers, any alternative proposals for determining a variable-cost floor for common carriers, and how the figures used in calculating the variable-cost floor can be updated from time to time. Any alternative proposals concerning just what costs should be included within the variable-cost floor and how the variable-cost floor should be calculated will fall within the scope of this limited rehearing. However, alternatives proposing that something other than variable cost should be the basis of our common carrier floor price are outside the scope of this limited rehearing. Proposals to subject special contracts to the floor price are also outside the scope of this limited rehearing.

3. This limited rehearing shall be held at such time and place and before such Commissioner or Administrative Law Judge as shall hereafter be determined.

4. The Executive Director shall provide notice of such rehearing to the parties hereto in the manner prescribed by Rule 52 of the Commission's Rules of Practice and Procedure. Persons who have not made a formal appearance in this case and who wish to be notified of the date of the rehearing should contact the Commission's Process Office.

5. Except as granted herein, rehearing of D.89-10-039, as modified hereby, is denied.

6. The stay of D.89-10-039, ordered by D.89-12-054, is hereby lifted.

7. Filipovich's petition for modification of D.89-10-039 is denied, without prejudice to his raising at our additional hearings on subhauler issues any matters discussed in his petition for modification that are relevant to those proceedings.

8. The Executive Director shall serve a copy of this decision, including Attachment 1, on all highway common carriers and highway contract carriers.

This order is effective today.

Dated February 7, 1990, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

INDEX

ATTACHMENT 1

Decision 89-10-039
as modified by Decision 90-02-021 on February 7, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Regulation
of General Freight Transportation
by Truck.

I.88-08-046

(Filed August 24, 1988)

(Appearances are listed in Appendix A.)

Decision on Rate, Safety, and Subhaul Regulation
for General Freight Transportation

OPINION

Summary

This decision finds that a workably competitive market exists in the general freight trucking industry and adopts a flexible regulatory program which allows the efficiencies of the market place to determine transportation rates. In addition to the flexible rate program a number of safeguards are adopted to ensure the public is provided safe, reliable service at reasonable, nondiscriminatory rates. These safeguards include some limitations on common carrier rates, a monitoring program, a minimum level of service requirement for common carriers, a requirement that all rates and associated discounts be filed and available for public inspection, and a toll-free telephone number for verifying carrier operating authority.

We believe this approach provides the benefits of competition with the control of regulation only where needed. Carriers will be able to openly compete for customers, but common carriers will not be allowed to discriminate without justification. Shippers will be free to have service tailored to their needs, and the trucking

industry will be able to respond to market pressures rather than regulatory mechanisms. We fully expect the dynamics of California's economy to be matched by the dynamics of general freight trucking, with the public the main benefactor of a more responsive and efficient industry. Safety will not be compromised in this achievement. Commission initiated and legislatively mandated programs will be in place to provide the public with direct regulation and enforcement of safety standards.

Under our flexible program, common carriers will be allowed rate freedom within a zone of reasonableness. The upper end of the zone is a 10% annual cap on rate increases; the lower bound is a minimum level of variable costs. Common carrier rate changes outside the adopted zone and collectively set rates require a formal application with appropriate justification. Contract carriers are not restricted by the adopted zone in establishing rates. To minimize direct competition between common and contract carriers, contract carriers are only authorized to enter into special contracts which provide for a special relationship between the carrier and the shipper or for service not normally provided under common carrier tariffs. All rates and contracts must be filed with the Commission. However, common carrier rate changes not requiring an application are effective on 10 days' notice. Special contracts are effective after 20 days' notice.

Subhauling will be subject to a division of revenues (between prime carrier and subhauler) to be determined after additional hearings.

Background

The issues raised in this proceeding were first addressed in Case (C.) 5436, et al., and later in Decision (D.) 90663, dated August 14, 1979. That decision set up a transition period leading to decreased rate regulation. (At about the same time, D.89575 (October 31, 1978) resulted in the initial opening of entry into the general commodities common carriage field for thousands of California permitted carriers.) With the passage of five years, I.84-05-048 was opened. That investigation included 26 hearing days, testimony from many segments of the transportation community, and an en banc oral argument. Finally, D.86-04-045,

dated April 16, 1986, adopted the present regulatory program as represented in General Order (G.O.) 147-A. Before its adoption in D.86-12-102, G.O. 147-A was the subject of extensive workshops conducted by the Commission's Transportation Division staff.

G.O. 147-A implemented a system of carrier-made rates, a rate window, rate exempt dedicated equipment contracts, and the imposition of a Truck Freight Cost Index (TFCI) that impacts rates for common and contract carriers in California. Additionally, the decision set up a new procedure for future justification of reduced rates and the review of rate reductions that were granted during the transition period.

It should be clear to the trucking industry that the progression of our attempts to meet the changing situation in California intrastate transportation has been developing over an extensive period. Our movement toward relaxed rate regulation has not been easy, but the issues have been repeatedly addressed and the parties have had ample opportunity to assemble their evidence and develop the record.

Aside from the fact that this proceeding is only part of a continuing progression of investigations, this is not a proceeding that contemplates total deregulation. The proposals which have been presented are premised on the Commission retaining jurisdiction over the carriers operating in the State. This would be consistent with our treatment of various aspects of specialized transportation such as fresh fruits and vegetables and tank truck operations, which were released from rate regulation only.

Procedural History

On December 16, 1987 an order was issued setting en banc hearings to consider the State's regulation of the for-hire trucking industry. This included consideration of all sectors in the trucking industry, not just general freight. En banc hearings were held in San Francisco on March 10 and 11, 1988 and in Los Angeles on March 18, 1988. At those hearings panels of experts and a parade of witnesses, including the Commission's Division of Ratepayer Advocates (DRA), expressed concerns about the regulation of the for-hire trucking industry.

On August 24, 1988, Order Instituting Investigation (I.) 88-08-046 an investigation into the regulation of general freight transportation by truck was issued. I.88-08-046 identified the Commission's regulatory objectives and invited a thorough re-examination of the current scheme of regulation. Prehearing conferences which established procedural rules were held on September 14, 1988 and October 17, 1988.

Fifty-four days of evidentiary hearings commenced on November 7, 1988 and concluded on February 24, 1989. Additionally, two public comment hearings were held, one in Los Angeles on December 5, 1988 and the other in San Francisco on December 12, 1988. The 56 volumes of transcripts totaled 7,286 pages.

The appearance list includes 59 individuals and organizations, 18 of which submitted briefs. One hundred six witnesses offered testimony including 19 rebuttal witnesses. A total of 186 exhibits and 13 reference items were received.

In accordance with § 311, the proposed decision of ALJ Ferraro was mailed on June 6, 1989. Comments were received from 16 parties. These have been reviewed and carefully considered by the Commission. Many changes induced by the comments and during our own deliberations have been incorporated into the final decision.

Positions of the Parties

Below is a description of each party's position with respect to rate regulation. The parties strongly disagreed on the proper amount of rate regulation for the general freight trucking industry. Their positions spanned the continuum from total deregulation to rigid rate regulation. In addition to the main issue of rate regulation, parties also addressed the closely related issues of: collective ratemaking, subhauling, safety, and credit rules. Each issue is discussed in a separate section.

California Trucking Association (CTA)

CTA is one of the largest and most active trucking organizations in the State, with about 2,500 members. CTA conducts programs on management and truck safety, has local and state-

wide committees which address important trucking issues, and engages in lobbying activities on behalf of its members.

CTA recommends increased economic regulation for a stable industry capable of meeting the state's needs. Additionally, CTA fears rate deregulation will cause rate discrimination, a reduction in service to small shippers and rural communities, increased highway accidents, and an increase in highway congestion and air pollution. If the market is allowed to set transportation rates, CTA argues that the Commission would give advantage to large volume shippers and high-volume traffic lanes.

According to CTA, during relaxed rate regulation (1980-1986) shippers, using market power, forced carriers to lower rates. This resulted in reduced carrier revenues and discouraged capital investment. General freight carriers suffered major losses of capital which manifested themselves in bankruptcies, exit from the industry, older equipment, and lower wages. The large number of bankruptcies and firms exiting the industry during this transition period resulted in poor quality service to some shippers and general instability in the industry. CTA states that lower trucking rates in the transition period: (1) increased shipper profits by nearly $1 billion, (2) were not passed through to consumers, and (3) continued until the current regulatory program was instituted.

CTA points out that in 1986 California carriers received a 10% rate increase, the first general rate increase in the Commission tariffs since 1980. This led to reinvestment in trucking equipment and employee drivers. To plunge these carriers back into cutthroat rate competition would cause disastrously low profit margins, impossible debt-to-asset ratios, and increase the difficulty of attracting new capital. Furthermore, market-set rates lead to overcapacity; carriers expand fleets and duplicate services in an attempt to increase market share. This results in an extra cost that society eventually pays for in pollution, congestion, and higher rates to shippers without market power.

CTA also asserts that the less-than-truckload (LTL) industry has large economies of scale which support predatory behavior. CTA points to the significant concentration in the interstate LTL

industry since rate deregulation in 1980 as evidence of this behavior. Additionally, CTA cites examples of rate discrimination in rate deregulated markets by Interstate Commerce Commission (ICC) carriers and lost service and increased rates to rural shippers. CTA believes that: (1) secret rates and discounts prevalent under deregulation prevent shippers from making informed decisions and effectively bargaining for rates, and (2) service to rural areas does not always support multiple carriers, which without rate regulation will result in shippers paying monopoly prices.

According to CTA, highway safety has also suffered because of relaxed rate regulation. CTA claims reductions in rates have lead to the use of older and inadequately maintained equipment, lower driver wages, and inadequately trained and emotionally unsuited drivers. CTA states that truck drivers are identified as the primary cause of over 90% of truck-at-fault accidents and argues that a direct connection exists between rate regulation and highway safety. Additionally, CTA believes that carriers in poor financial condition will delay needed maintenance, hire poor quality drivers, and operate in an unsafe manner.

In another area related to motor carrier infrastructure, CTA cites the recent enactment of SB 151 (Stats. 1987, Ch. 1301) which gave the South Coast Air Quality Management District (District) authority to restrict traffic within its jurisdiction. The law also provides for the formation of other jurisdictions throughout the state. Among the proposals being considered by the District are peak period fee assessment, traffic diversion, requiring carriers to retrofit equipment with engines which burn clean fuel, and outright bans. Additionally, the City of Los Angeles has proposed ordinances and the California Air Resources Board has adopted guidelines for restricting truck traffic to minimize air pollution. CTA claims this threatens free access to California's freight transportation infrastructure and recommends Commission action to reduce the involvement of local jurisdictions.

CTA's proposed regulatory program will require all common carriers to file rates through tariff bureaus granted Public Utilities (PU) § 496 antitrust immunity. Within the bureaus, individual carriers will have the right of independent action. Proponents of

any change in a common carrier rate must either be a tariff bureau member carrier whose traffic is directly affected, or an affected freight bill payer. All bureau rate changes must receive Commission approval before publication. All common carriers must publish rates to all points and places in their service area. Cost justifications for rate changes shall include the costs of operating in compliance with all State and Federal laws including: the speed limit, hours of service limitations (including waiting or delay times), and compliance with weight regulations.

Contract carriers will be required to file contracts with the Commission. Rate increases may be filed on one day's notice and rate reductions must be filed on 30 days' notice, measured from the date of publication in the Commission's Transportation Calendar. Rate reductions must be cost-justified under the same rules as common carrier cost justifications. All contracts must include a provision which makes the shipper co-liable for all accidents arising from the carrier's performance for the contract shipper. A carrier would have no limit on the number of non-dedicated contracts it may enter.

Contract carriers will be limited to three dedicated contracts. To be eligible to use dedicated contracts a contract carrier must meet the following conditions: (1) only carrier employees or subhaulers paid in accordance with a cost-justified settlement schedule may be used, (2) balance sheet assets must be at least 1.4 times greater than current liabilities, (3) labor cost on the carrier's income statement must meet the labor ratio test, (4) at least 50% of the carrier's revenue must be earned from intrastate California transportation, and (5) a driver selection and training program, and an equipment maintenance, repair and replacement program must be in place.

Additionally, carriers wishing to use cost justifications and dedicated contracts must place, at an acceptable level, in a measurement device called a safety score. The safety score examines financial and operating data that CTA studies claim are correlated to highway safety. An acceptable safety score is one in the top two-thirds of all motor carriers. Common or contract carriers who are ranked in the bottom third must provide a cost justification which demonstrates the reduced rate will measurably

improve at least one of the four elements of the safety score. This improvement must be sufficient to move the carrier out of the bottom third. Contract carriers wishing to use dedicated contracts must have a safety score in the upper half of all carriers. More details on the safety score will be provided in the safety section.

The current programs for the TFCI, prevailing wage, rate window, and rules for meeting a competitor's rate remain unchanged. Subhauler rates would be regulated and subhaulers paid in accordance with a cost-justified rate schedule. More detail on CTA's proposals for subhauler regulation is contained in the subhauling section.

Ad Hoc Carriers Committee (Ad Hoc)

Ad Hoc, a coalition of motor carriers and others in the transportation industry, was formed for the purpose of participating in the investigation of general freight motor carrier regulation. Ad Hoc presented numerous witnesses including an accounting professional, equipment sales representatives, a subhauler, a prime hauler and several transportation consultants. The testimony offered covered a broad spectrum of economic and policy issues, but only two witnesses submitted specific recommendations.

Ad Hoc believes the issues addressed in this OII were adequately examined in prior proceedings, and general freight motor carriers have achieved a limited degree of stability and financial benefits under the current regulatory program. To seek major changes at this time is premature and the industry should be given a full opportunity to make the current program work.

Ad Hoc does recommend some fine tuning to the existing regulatory program in areas that have been identified as problems. In two instances, Ad Hoc witnesses differ on the modifications that should be made: rate window filings and competitive rate filings under G.O. 147-A. One recommendation for rate window filings would discontinue the filings because they are more of a burden than a benefit. The other recommendation would continue rate window filings without change because they are working satisfactorily for both carriers and shippers. There is also a conflict with Ad Hoc's recommendations for competitive rate

filings. One continues the filings with no changes since the provisions contain several protections against abuse of the privilege, and the other continues the filings, but allows existing carriers to meet competitive rates without having previously handled the traffic.

Ad Hoc proposes that existing common carriers be allowed to lower rates to meet a competitor's generally applicable common carrier (GACC) rates without cost justification. This recommendation addresses the competitive advantage of new common carriers and existing contract carriers. These carriers can file any existing GACC rate without cost justification, while existing common carriers must cost-justify the same rate. Ad Hoc's proposal would eliminate this competitive advantage.

Ad Hoc also recommends that the TFCI, dedicated contracts, and cost justifications be retained with a sincere effort on the part of Commission staff and the industry to educate carriers and shippers on the requirements. Additionally, Ad Hoc requests an investigation into discounts because discriminatory and preferential discounts are illegal, improper, and contrary to the interests of consumers.

In support of its recommendations Ad Hoc concludes that deregulation will result in the following:

1. Lower rates to larger shippers and higher rates to smaller shippers.

2. An increase in total intrastate transportation costs.

3. Increased profits for major shippers.

4. A decrease in the ability of intrastate carriers to attract capital.

5. Drivers and subhaulers working excessive hours at illegal speeds.

6. Reduced expenditures for vehicle maintenance and safety.

7. An increase in the average age of equipment utilized by intrastate for-hire motor carriers licensed by this Commission.

8. Diminished availability and frequency of motor carrier services to small towns and rural areas.

Although Ad Hoc makes recommendations for changes or modifications to the current program, it does not specifically outline the steps that should be taken to effect the changes. Ad Hoc believes it is in the best interest of the State's economy to give the existing program a chance to work, and urges the Commission to address regulatory issues within the scope of the current program rather than adopting a new regulatory program.

California Teamsters Public Affairs Council (Teamsters)

Teamsters supports the continuation of the current program, with some modifications, and specifically opposes less restrictive rate regulation. Teamsters believe large shippers have benefited from deregulation through lower shipping rates and greater market clout, but that those benefits do not balance the negative social and economic consequences. In its view both interstate deregulation and the period of relaxed rate regulation in California (1980 and 1986), caused enormous economic disruption in previously stable markets. This had particularly disastrous consequences for small shippers, highway safety, and industry employees.

Teamsters addresses the allegedly negative effects of lessened rate regulation, and argues that no evidence has been advanced to show the cost-justified rate system now in effect produces noncompetitive rates, "monopoly rents" for workers, or any of the other problems allegedly suffered by shippers prior to 1980. Teamsters states that labor (particularly union labor) shouldered much of the economic burden of deregulation. Many employees were forced to accept pay cuts, increased work hours, and a decline in working conditions. Workers who had been steadily employed for decades found themselves unemployed or underemployed while others lost health care or pension benefits for themselves and their families. This loss of benefits places additional burdens on taxpayer supported services, rather than carrier supported plans.

Teamsters also focused its attention on the relationship between economics, highway safety, and the impact of interstate

deregulation. While freely admitting there is no simple correlation to be made between highway safety and deregulation, Teamsters argues the economic pressures brought on by deregulation have a definite impact on certain factors related to truck accidents. These impacts include: (1) delays in new equipment purchases, (2) deferred vehicle maintenance, (3) poor management and personnel practices, and (4) unsafe operating practices.

Teamsters proposes the current rate regulation program be modified in three areas. First, the TFCI should be updated more than once a year for labor and other fixed costs. Second, the Prevailing Wage Report should be revised to exclude carriers who pay drivers minimum wage and to include nondriver employees as a secondary labor cost. Finally, Teamsters advocates a fixed division of revenues between subhaulers and prime carriers, with prime carriers compensated only for their costs. Prime carriers would be required to pay subhaulers rates which are cost-justified using subhauler costs. Teamsters' recommendations for subhauling are discussed in more detail in the subhauling section.

Highway Carriers Association/Willig Freight Lines (HCA)

Highway Carriers Association is an organization of approximately 600 small carriers, and Willig Freight Lines is a large LTL carrier with both interstate and intrastate operating authority.

HCA says this proceeding is unnecessary and should not have been undertaken because the current regulatory program is the result of a recent and extensive inquiry into the regulation of general freight. HCA believes the existing program contains defects, but maintains that the remedies are relatively simple and straightforward and do not warrant a complete overhaul. HCA advocates instituting the modifications to G.O. 147-A recommended by the Commission staff in November 1987. These recommendations would:

1. Allow generally applicable common carrier rates to be published by existing common carriers, not merely new common carriers and contract carrier competitors.

2. Remove the requirement that a carrier already be handling the traffic in order to meet the rates of a competitor.

3. Create a provision whereby carriers could make minor changes to tariffs without having to file a cost justification or a formal application.

An additional problem with the existing program occurred when carriers were required to transfer rates from transition tariffs (pre-1986) to individual publications or bureau tariffs. Many smaller carriers could not afford to file all former rates simultaneously and chose to file simplified tariffs. However, once an initial filing was made, subsequent changes required Commission authority. Unfortunately, many carriers did not become aware of this until after their actions limited their options.

HCA also recommends clarification of the TFCI. A literal interpretation has resulted in application of the LTL index to thousands of TL rates published on a "per unit" or "per mile" basis. HCA has also identified a number of technical refinements to the TFCI which should be addressed.

In response to the proponents of flexible rate regulation HCA argues that:

1. Shippers do not pay more in California than elsewhere.

2. Shippers are not moving out of California, they are moving into the State.

3. Consumers will not pay less when trucking rates decline.

4. Just-in-time production concepts have been in California for many years.

5. Flexible rate regulation would create inequities between competing classes and undermine the common carrier system.

6. Less rate regulation will have a significant detrimental effect on safety.

Finally, HCA urges a fine tuning of the existing program to allow the industry to continue on the course of establishing competitive, carrier-set, cost-based rates.

Parties Represented by Edward J. Hegarty (Hegarty)

Hegarty represents the California Carriers Association and the California Dump Truck Owners Association. Hegarty raises numerous legal arguments in support of the existing regulatory program. These are addressed in the legal section below.

Additionally, Hegarty points out that the classification of freight as either general or dump truck is an issue in C.5437, OSH 323 and should not be litigated in this proceeding. We agree with Hegarty on this matter and will leave the classification of freight to be resolved in C.5437, OSH 323.

West Coast Freight Tariff Bureau (WCFTB)

WCFTB supports the current regulatory program because it preserves rate stability and ensures a stable trucking industry. WCFTB says the trucking industry was financially hurt by the transition period and that small companies will be forced out of business by destructive and predatory pricing if rate regulation is significantly reduced or eliminated.

According to WCFTB, DRA's proposal is discriminatory and unfair to common carriers. Common carriers are required to file rates while contract carriers are not. This presents an unfair competitive environment between common and contract carriers.

Finally, WCFTB supports continuing the current regulatory program with the following modifications: (1) allow existing carriers to file new GACC rates, and (2) allow all carriers to meet the rates of competitors with a cost justification within 60 days. WCFTB also supports carriers having the choice of individual tariffs, agency tariffs, or subscribing to a tariff bureau which has antitrust immunity in accordance with PU § 496.

Pacific Motor Tariff Bureau (PMTB)

PMTB represents approximately 300 carriers, the majority of which are small and file only intrastate rates. PMTB argues that the current program has been in effect only two years and should not be overhauled.

Furthermore, PMTB believes that large shippers and carriers which propose flexible or no rate regulation are motivated by self-

interest. Under their proposals, large shippers will be in a superior bargaining position for preferential rates and large carriers will enter new markets intent on domination or destruction. In contrast, small family-owned carriers are interested in safeguarding their livelihood through rate regulation and small shippers without bargaining power seek Commission protection.

According to PMTB, the Commission has the responsibility to make a decision in the best interests of the public by ensuring a transportation system that is safe, efficient, and offers adequate service levels. With some minor adjustments, PMTB believes the current regulatory program meets these objectives. Since PMTB modifications to the current program parallel those of HCA, they will not be repeated.

Cal-West Tariff Bureau (CWTB)

CWTB represents approximately 500 members which have operating authority from the Commission. CWTB: (1) advocates retention of the current system with some modifications, (2) believes the present system creates a competitive environment, is reasonable, and allows rate flexibility, and (3) asserts that regulatory change would adversely affect the industry and the public.

The testimony of CWTB describes the problems experienced by carriers during the period of rate flexibility, 1980 through 1986. Its witnesses recounted situations in which they were compelled to offer excessive rate reductions to retain business. One witness, who provides repair services to many carriers, testified that equipment is not being maintained properly because deregulation reduced revenues.

Furthermore, CWTB states that contract and common carriers currently compete for the same traffic, but economic deregulation of contract carriers would result in predatory pricing practices and prejudicial pricing in favor of large volume shippers. This would prevent common carriers from competing for favorable traffic and force the common carrier industry into bankruptcy.

CWTB supports a regulatory policy that will be uniform in its application and enforcement and will ensure adequate service without discriminatory rates. To accomplish this, CWTB believes

the current rate regulation program must be continued for both common and contract carriers. However, CWTB recommends the following steps to fine-tune the existing program:

1. Cost justifications applicable for only one year.

2. Common carriers allowed to reduce rates to meet other carrier GACC rates.

3. Elimination of the requirement that a carrier already handle traffic to meet the cost-justified rate of a competitor.

4. Published guidelines for cost-justifying rates.

5. Strict enforcement of the Commission rules and regulations.

6. Review of the regulatory program five months after this decision.

National Motor Freight Tariff Association (NMFTA)

NMFTA is a Virginia based tariff association with approximately 7,000 participating carriers, 188 of which have intrastate operations in California. NMFTA publishes the National Motor Freight Classification, which it files with the Interstate Commerce Commission (ICC) and 42 state regulatory agencies, including this Commission.

The primary issues addressed by NMFTA are: (1) whether there is a link between economic regulation and motor carrier safety, and (2) the effect elimination of motor carrier rate regulation would have on the California trucking industry infrastructure. NMFTA states there is definite linkage between economic regulation and safety, with partial or complete elimination of motor carrier regulation resulting in a deterioration in highway safety. The elimination of interstate motor carrier regulation has also adversely affected the financial stability of the trucking industry, resulting in poor service and/or high rates to small shippers and communities. Shippers of difficult to handle commodities have been left with no public service. Undesirable freight has been shunned and/or used to subsidize the reduced rates obtained by the favorite few. Excessive competition has driven

established carriers out of business and causes many carriers to operate at rates which do not meet their costs.

NMFTA argues that the interstate experience has taught that economic pressures, created by rate discounting and excessive competition, give rise to safety problems due to reduced maintenance expenditures, the inability to purchase new equipment, and reduced driver wages. Under the interstate system, published discounts are often below cost and do not indicate to whom they apply. Some shippers have pressured carriers to establish arrangements whereby the shippers are paid the published discount even though they do not pay the freight bill.

NMFTA submits that the interstate system has produced preferential and discriminatory rate practices and if California abandons rigid rate regulation it would experience similar effects. Regulatory control, economic and otherwise, over motor common and contract carriage is absolutely essential to the success of California's intrastate transportation system. NMFTA believes that while the current program may require additional fine-tuning, its regulatory objectives are sound. Further implementation and experience with this program should occur before the industry and the public are subjected to disruptive policy changes.

Folger Athearn, Jr. (Athearn)

Athearn is a transportation consultant who appeared on behalf of himself and testified for Ad Hoc. Athearn argues that the federal experiment in transportation deregulation has resulted in a decrease in the availability of full service motor common carriers, which are essential to small businesses and small rural communities. This conclusion was drawn from Athearn's analysis which determined the number of common carriers having authority to serve California's county seats declined by 48% from 1982 to 1988.

Athearn also states that full service motor carriers have been unable to resist the economic pressure to charge their major corporate customers lower rates or grant higher discounts while charging small business more for the same service. This discrimination has placed small businesses and small rural communities at

a disadvantage that cannot be explained by differences in the cost of transportation service.

Finally, Athearn is opposed to common carriers publishing rates for specifically named customers or predicating rates on meaningless bill of lading certificates. Secret rates in confidential contracts are not in the public interest. Athearn believes that carriers should not be allowed to hold both common and contract authority and the only way to prevent discrimination is to require carriers to publish their rates.

AcTran

AcTran is a consulting firm primarily involved with interstate and intrastate transportation rate analysis. AcTran supports the current regulatory program and identified a number of problems that exist in the interstate deregulated market. Among the specific ills are unsafe driving practices due to reduced rates and the use of rebates and kickbacks. Another serious problem is the filing of rates. Contract carriers are not required to file rates and common carrier filing requirements are not enforced. Finally, AcTran submitted a comparison of interstate and intrastate rates and expressed concern over a trend toward monopolization of the trucking industry.

Parties Represented by Gary Haas (Haas)

Haas represents three carriers: Cooper Fine Line Transport, Dolo-Chem Transport, Inc., and Great American Transport. These carriers testified in support of rate regulation, but criticized the implementation of the current program. They also object to inadequate enforcement and oppose rules which favor large carriers over small carriers.

Division of Ratepayer Advocates (DRA)

DRA is a separate division within the Commission assigned to investigate, develop, and promote policy positions for the public in general, and ratepayers specifically. As its name suggests, DRA represents the interests of those who pay the rates, including shippers, consignees, and ultimate consumers of the goods shipped. DRA is also interested in the welfare of the trucking

industry, but wants the greatest value at the lowest price, consistent with safe, reliable service.

DRA states that general freight transportation is an essential service to commerce, industry, and the public at large. However, its tendency is not toward a natural monopoly and does not require unique access such as transmission lines. Historically, trucking regulation has differed from regulation of classic monopolies (gas, electric, telephone, and water utilities). The rates set by the Commission have been minimum rates rather than fixed rates, and this protected the industry rather than the consumer. Although the current system for general freight is not traditional minimum rate regulation, it still protects the industry.

Additionally, DRA claims the rationale for this protective regulation has been to avoid the negative effects of excessive competition, rather than the negative effects of insufficient competition. Those advancing rigid rate regulation assert two types of harm may result from less regulation: predatory pricing and destructive competition. The arguments for retaining this protective regulation come mainly from trucking companies. They seek four different kinds of protection:

1. Protection from themselves: truckers are incapable of calculating their own costs and/or unable to be restrained by market forces.

2. Protection from each other: truckers are so rapacious they will consume each other or drive each other out of business.

3. Protection from shippers: large shippers will be able to drive transportation prices below cost.

4. Protection for the public: consumers will ultimately pay higher prices, service will deteriorate, and the highways will be unsafe.

According to DRA, these protections are founded on unreasonable assumptions. The arguments espoused by those favoring rigid rate regulation are inconsistent with economic theory, practical experience, and common sense. Furthermore, rate regulation has

never directly controlled, or adequately addressed safety and service.

DRA is convinced that economic regulation interferes with the efficient operation of market forces and imposes unwarranted regulatory costs on carriers which are passed on to shippers and ultimate consumers. The regulatory process also prevents prices and service from rapidly responding to changes in the market. Pricing based on average or representative carrier costs contributes to inefficiencies and prevents new entrants from exerting competitive pressure on existing carriers.

By contrast, DRA believes California consumers will enjoy substantial benefits if general freight rate regulation is relaxed. Relaxed regulation will encourage competition in the marketplace, creating strong incentives to minimize carrier costs and increase service options. Increased competition will reduce transportation prices through lower carrier profits, lower labor costs (more efficient deployment; not necessarily lower wages), and more efficient operations.

Other than pricing flexibility and service availability, safety on the highways is the primary concern of DRA. Proponents of rigid rate regulation argue that relaxed rate regulation will result in unsafe practices and greater risks on the highways for carriers, shippers, and the public at large. However, DRA states that rate regulation has never required direct expenditures on safety. Moreover, a review of the safety literature and the best available information does not support the claimed link between rate regulation and highway safety. This body of information indicates that direct enforcement of safety regulations has the greatest impact on highway safety.

DRA argues that motor carrier safety pays and responsible carriers seeking to operate profitably will operate consistent with this principle. The benefits of safety (greater profits) far outweigh the consequences of unsafe operations (financial losses and increased insurance rates). DRA concludes that direct safety enforcement is the most cost-effective method of protecting the public from irresponsible carriers.

DRA also asserts its proposed regulatory program will enhance competition in the trucking industry, reduce transportation rates and the cost of goods sold in California, and improve transportation service. The proposed program is a two-phase approach. The first or interim phase relaxes current rate regulations, and the final phase removes: (1) most controls over contract carriers, and (2) controls over common carriers, consistent with constitutional and statutory requirements.

The interim phase would return the carrier industry to the direction of the 1980 through 1986 transition period with additional rate freedom. Rates of common and contract carriers would be filed with the Commission. Rates lawfully on file with the Commission when the program is implemented would continue in effect. New carriers could establish rates to meet any other carrier's rates immediately upon filing, with the exception that common carriers could not meet contract rates. Common carrier rates on file could be increased and/or decreased once in a calendar quarter up to 5%, effective on the date filed. Increases of more than 5% would require a formal application. Contract carrier rates could be decreased in the same manner as common carrier rates. There would be no limit on contract carrier increases.

Common and contract carrier rates could be decreased by more than 5% by filing the rates on 30 days' notice. These filings would be listed on the Commission's Transportation Calendar. All rates are subject to complaint by affected parties who bear the burden of proof. Rates in formal applications are subject to protest. The burden of proof for rates subject to protest rests with the proponent of the rates.

Collective ratemaking would continue pursuant to current statute and G.O. 154.

In the final phase, common carrier rates would be filed with the Commission. Contract carriers would be required to execute and maintain contracts, but would not be required to file them with the Commission. Contracts are subject to review by Commission staff as to their existence and to determine that carriers rates are valid. All carriers would be required to adhere to the rates and charges specified in their tariffs and/or contracts.

Common carrier rates could be established (new rates, or new carriers) at any level or reduced to any level on the date filed. Common carriers could increase rates on file up to 10% per calendar quarter, effective on the date filed. Common carrier rate increases greater than 10% would require a formal application.

Complaint and protest mechanisms remain the same as in the interim phase.

Collective ratemaking would continue pursuant to current statute and G.O. 154.

California Coalition for Trucking Deregulation and Viking Freight Systems, Inc.

California Coalition for Trucking Deregulation (Coalition) is a nonprofit organization with a membership of approximately 150. While most members are shippers, the membership also consists of shipper organizations and several carriers. The primary purpose of the Coalition as stated by its policy witness is to seek:

> "... an end to economic regulation of carriage of general freight in California. And the objective—the genesis of that was an attempt to bring efficiency to the motor carrier industry as seen by the members of the Coalition.
>
> "Efficiency doesn't mean lower prices. Efficiency means, among other things, flexibility, the ability of carriers and shippers to engage in innovative and creative ways to solve joint problems, managerial certainty with regard to contracts entered into between two parties without the intervention of the government as a third-party, among other things." (TR 6086-6087.)

Viking Freight System, Inc. (Viking) operates as a LTL and truck-load (TL) general freight common carrier providing van and flatbed transportation services. Viking is the largest motor carrier operating within the State. As a member of both the Coalition and CTA, Viking supports the Coalition's position.

The Coalition claims that current rate regulation fails to permit the types of pricing and service flexibility achieved in competitive jurisdictions, thereby stifling innovation and decreasing the effi-

ciency of intrastate transportation operations. Lack of rate and tariff flexibility prevents shippers from utilizing modern procurement practices. Lack of contract rate flexibility limits the ability of shippers to properly define their relationships with carriers.

According to the Coalition, there is substantial evidence that California's regulatory program has increased many motor carrier rates beyond normal competitive levels and has skewed rates away from appropriate levels. This is supported by rate comparisons which indicate that rates paid for California intrastate transportation services are higher than in other jurisdictions. Furthermore, it can be inferred by the difficulty of the cost justification process that appropriate rate reductions have been discouraged. Finally, Viking's experience with write-in tariffs demonstrates the efficacy of intrastate economic deregulation.

The Coalition does not believe the arguments that price discrimination will occur in the absence of economic regulation. There are no valid empirical studies supporting claims of price discrimination or inadequate service in rate deregulated markets. Additionally, the current program provides little, if any, cross subsidies that lower rates to small and rural shippers. If it did, questions of equity would be raised.

Economic regulation, argues the Coalition, is not required to preserve the trucking industry. Strict economic regulation only benefits the inefficient, mismanaged carrier. Moreover, the increase in concentration of interstate LTL carriers does not necessarily mean less competition. It is not the number of carriers operating nationally, but the number of carriers operating within a particular market that is important. Since deregulation, carriers which had previously been prohibited from entering other carriers' markets became free to do so. As a result, there has been large-scale market entry by existing LTL firms invading each other's markets. Finally, to the extent interstate deregulation has decreased motor carrier profitability and the number of carriers, it accomplished a weeding out of unduly high rates of return and inefficient operations.

With respect to safety and rate regulation, the Coalition takes the position that the most effective means to promote truck safety

is through rigorous enforcement of safety laws and regulations. First, the Coalition points out that CTA's testimony indicates that the citation rates of Commission regulated carriers was 20 times higher than all other commercial vehicles from mid-1987 to mid-1988. CTA's testimony also shows Commission regulated carriers involved in 36 times as many truck-at-fault accidents during the same period. From this and other safety data and the safety studies presented in the proceeding, the Coalition concurs with the testimony of the United States Department of Transportation (DOT) witness, which states:

> "I have been unable to find any link between economic deregulation and motor carrier safety. A far more plausible linkage exists between vigorous enforcement of safety laws and regulations and the enhancement of motor carrier safety." (Exh. 26 at 12.)

The Coalition also points to evidence that carriers have numerous incentives to operate safely. Viking's President explained his company's philosophy of how safety pays as follows:

> ". . . an awful lot of people feel like companies don't throw dollars at safety because it's a direct cost. But we look at safety as being a cost containment program. Since we are selfinsured with a high dollar level that we retain ourselves, every dollar we throw in improving our safety means less dollars that we pay out for accidents and injuries. So we've had a very active safety program. And, if anything, our safety program is growing during the years since 1980." (TR 1932.)

This testimony was also mirrored by a number of small carriers.

As described below, the Coalition proposes a regulatory programwhere carriers are free to charge rates driven by market forces, without regulatory intervention. This program would be effective within 90 days from the date of this decision. The salient features of the program are as follows:

1. Contracts between contract carriers and their shippers must be in writing, and a copy must be maintained at the carrier's premises, but a copy need not be filed with the

Commission. All existing Commission regulations governing contract carrier rates and practices would be repealed.

2. G.O. 147-A would be repealed in its entirety.

3. Common carriers would be able to independently file all rate increases, decreases, and changes in rules and regulations in tariffs. These would be effective on the date of filing with the Commission and remain in effect until withdrawn by the carrier or determined to be unlawful.

4. All independently filed common carrier tariffs would be presumed to be marketdriven and, therefore, reasonable.

5. An expedited procedure, providing for final Commission action within 60 days, would apply to complaints against independentlyfiled common carrier tariffs. The grounds for finding any tariff unlawful would be limited to cases where the complainant establishes, by a preponderance of the evidence, that the rate complained of constitutes either predatory pricing or an abuse of market power within the meaning of antitrust laws.

6. Rate increases, decreases and changes in rules and regulations of common carriers filed by rate bureaus as a result of collective action pursuant to PU § 496 would not be allowed to take effect until the bureau has presented sworn evidence sufficient to enable the Commission to find that the proposed rate is market-driven, does not constitute predatory pricing, and does not constitute an abuse of market power.

7. Safety objectives would be accomplished through direct enforcement by the California Highway Patrol (CHP), with supportive action by the Commission through the exercise of its entry and revocation powers.

Finally, the Coalition presented a witness from Viking that addressed the use of electronic data interchange to exchange freight documentation, such as bills of lading, freight fills, rate quotes, delivery receipts, and trailer manifests with its shippers.

Silver, Rosen, Fischer & Stecher, P.C. (Fischer)

Fischer represents three carriers: American National Can Company, Leaseway Transportation Corp., and Dirksen Transportation, Inc. Fischer stresses that this proceeding represents the latest step in a process which began 14 years ago when the Commission began to question the efficacy of the Minimum Rate System. During that time the Legislature and the Commission have considered the extent to which intrastate transportation should be regulated. Various aspects of specialized transportation such as fresh fruits and vegetables and tank truck operations were released from rate regulation, while the transportation of cement was placed under more rigid rate regulation.

Two issues are addressed by Fischer: economic deregulation of contract carrier rates and intrastate subhauler regulation. No position is taken with respect to intrastate common carrier rate regulation or bureau-made rates. Fisher supports relaxed rate regulation for contract carriers and cites the testimony of an Arizona carrier as an example that relaxed rate regulation works. The witness for the Arizona carrier testified that his company has experienced substantial growth since Arizona's deregulation, and that the expansion would have taken substantial amounts of time and money in a regulated environment. This witness did state that a number of large carriers had ceased to serve in Arizona since deregulation, but that their failure was probably due to their unresponsiveness to the market.

Finally, Fischer asserts that no convincing argument was offered to support continued rate regulation of contract carriers. Most parties opposed to relaxed rate regulation represented large established common carriers, which felt they could not operate without government protection. A number of carriers that do engage in contract carriage, such as Dirksen Transportation, Inc., support relaxed rate regulation. Fischer argues that the current regulatory program inhibits innovative rates, deters new service options, and makes coordination of intrastate and interstate rates all but impossible.

Specifically, Fischer recommends no rate regulation for contract carriers transporting general freight commodities and that

contract carrier contracts be filed with the Commission and available for public review. Fischer's subhauling recommendations are addressed in the subhauling section.

California Manufacturers Association (CMA)

CMA is an organization which represents the interests of businesses which process goods. CMA predicts drastic changes in California's population, industry, and technology and believes the trucking industry needs a regulatory program that provides carriers the flexibility to adapt to these changes. Because accurate predictions of these interactions with the trucking industry are difficult, if not impossible, CMA concludes that the marketplace will be a better provider of goods and services than government planning and price fixing. This has led CMA to propose a program of rate regulation similar to that of the Coalition: no restriction on increases or decreases in carrier-set rates.

CMA also takes exception to the safety data and conclusions presented by the parties that favor rigid rate regulation. According to CMA, solid data shows no significant connection between rate regulation and truck safety. Moreover, intelligently operated carriers operate safely because safety pays. Finally, there is no reason to use an ineffective regulatory program to affect safety when direct safety regulation and enforcement is more effective.

Implementation of the CMA proposal would have two significant differences from the ICC regulatory program. First, common carrier tariffs would be completely public and subject to change through a public process. Second, contracts would be private documents and all special rates available to a single shipper would be contracts. No carrier action with respect to rates and terms would be subject to regulatory action except complaint, where the burden of proof would be on the complainant. The shipper would have a signed legal contract, not a letter or waybill notation. All freight movement would be subject to a single charge: either the carrier's applicable posted tariff or the applicable contract rate.

Contracts would be signed documents enforced by the courts, bilateral, and represent a continuing relationship. Contracts effective for more than 30 days after this decision would be free of

regulatory oversight. All existing approved contracts would remain in effect until their expiration dates.

Common carriers would file tariffs with the Commission and provide copies on request in return for reasonable reproduction costs. Discounts would normally be available to the public, but could conceivably be restricted to a single shipper. Rate increases would be effective five days after filing and decreases effective one day after filing. Rate increases would be subject to Commission staff surveillance. Common carrier tariffs could refer to any mileage table, or other distance establishing mechanism, which is publicly available. Existing common carrier tariffs could be retained.

Additionally, carriers engaged in unregulated operations would be relieved of filing financial reports with the Commission.

Center for Public Interest Law (CPIL)

CPIL supports the ICC's deregulation policy and recommends the elimination of economic rate regulation in California. CPIL argues that deregulation translates to a decrease in consumer prices because the core rationale for rate regulation is to raise prices above market levels. If regulation merely mirrored market-set rates it would have little value and deregulation would have no impact on transportation rates. Accordingly, rate regulation exists solely to prop up prices, and when relaxed or removed, prices will decline. Studies conducted on the effects of deregulation at the federal level confirm that deregulation has resulted in lower trucking costs and lower consumer prices.

CPIL proposes a targeted approach to regulation. Such an approach supplies the two ingredients vital for any law or regulation: sharp definition of the precise problem requiring intervention and a rifle-like focus on a solution. CPIL's targeted approach would allow carriers easy entry into and easy exit from the market. The only barriers to entry would be directly related to safety or financial fitness. Carriers could raise or lower rates without restriction or approval. CPIL would target safety/minimum service levels, predatory pricing, and other market abuses. These are discussed in more detail in the monitoring section.

National Small Shipments Traffic
Conference, Inc. and Health and
Personal Care Distribution
Conference, Inc. (NSSTC)

National Small Shipments Traffic Conference, Inc. is a broad-based organization of approximately 225 large and small corporations with interests in small shipment traffic. Health and Personal Care Distribution Conference, Inc. is a trade association of approximately 70 corporations.

NSSTC believes the current program impedes the ability of buyers and sellers of transportation services to set rates. Cost justifications, the prevailing wage, and the Commission's participation as a third party are some of the impediments to market-set rates. NSSTC argues that the current regulatory program is not designed to reward efficient carriers. Rather, the program rewards the carriers adept at learning and using the regulatory rules. Additionally, NSSTC states that because entry is easy, predatory pricing and destructive competition are unlikely and should be left to antitrust laws.

Finally, NSSTC generally agrees with the Coalition's regulatory proposal, but recommends modifications for credit rules and collective ratemaking. Further details are included in those issue sections.

Americans for Safe and Competitive Trucking (ASCT)

ASCT is a coalition of: (1) companies that operate trucks, (2) shipper and receiver associations, (3) public interest groups, and (4) various sized businesses. ASCT supports increased truck safety enforcement and less economic regulation of trucking, and believes California intrastate regulation should be no more restrictive than ICC regulation. Based on its analysis of business logistics costs, ASCT determined that under ICC deregulation moving and storing inventories have become more efficient, saving producers and consumers from $30 to $60 billion. From its study ASCT concluded that these savings resulted from relaxed rate and service regulation and substantial savings would occur in California if intrastate rate regulation is relaxed.

United States Federal Trade Commission (FTC)

FTC asserts that it has a mandate to preserve competition and protect consumers from deception and unfair business practices. Interstate and intrastate trucking deregulation furthers this goal by lowering prices and increasing the quality of service to shippers. Furthermore, FTC argues that deregulation in other jurisdictions has not brought predatory pricing or the loss of service to small communities. Finally, FTC believes there is no connection between safety and economic regulation and relaxed economic regulation will result in significant benefits for California.

United States Department of Transportation (DOT)

DOT supports flexible rate regulation and says it is unable to find a link between economic regulation and motor carrier safety. DOT asserts that service studies in deregulated jurisdictions do not indicate a deterioration in transportation services, even in rural and small communities.

California League of Food Processors (CLFP)

CLFP is a nonprofit trade association of large shippers of general freight and agricultural products. CLFP believes the current regulatory program adversely affects the health of the State's economy, protects inefficient carriers, and creates excess capacity. CLFP recommends a program of no economic regulation.

Analysis of Current Regulatory Program

The current regulatory program for California's intrastate general freight trucking industry dates from March 1, 1987, the result of D.86-04-045 and D.86-12-102. The program replaced a transition regulatory program that allowed carriers much greater ratemaking freedom. A table that outlines the basic features of the present program is shown below.

TABLE 1

CURRENT REGULATORY PROGRAM

Common Carrier Rates	Standard Contracts	Dedicated Contracts
Increases(1)	Increases	Increases and Decreases
File—Application	File—Contract with TD	File—Contract with TD
Notice—Transportation Calendar	Notice—None	Notice—None
Protest Period—30 days	Protest Period—None	Protest Period—None
Approval—Commission Decision	Approval—None if format accepted by TD	Approval—Accepted by TD(2)
Effective—Usually 5 days	Effective—Date filed	Effective—Date filed
Decreases(1)	Decreases	
File—Tariff filing with TD	File—Tariff filing with TD	
Notice—Transportation Calendar after 30 days' TD review	Notice—Transportation Calendar after 30 days' TD review	
Protest Period—30 days after Calendar	Protest Period—30 days after Calendar	
Approval by TD(3)	Approval by TD(3)	
Effective—After protest period unless suspended	Effective—After protest period unless suspended	

(1) Separate procedure for rate window filings.
(2) Acceptance after demonstration of profitability.
(3) Accepted after cost justification.

When the current program was established, continuity with previous programs was afforded by approval of generally applicable common carrier (GACC) rates. These rates were and are still based on the Commission's old minimum rate tariffs. Because the minimum rates were originally established in formal proceedings, GACC rates are considered reasonable and require no further cost justification.

With some exceptions, under the current regulatory program a common carrier rate increase must be filed as a formal application. Public notice is provided on the Commission's Daily Transportation Calendar, and there is a 30-day public protest period. If the applicant's showing is adequate and there are no protests or requests for hearings from either the public or the Transportation Division (TD) staff, then the increase may be granted by ex parte order of the Commission. Otherwise a public hearing is held, with the ensuing decision subject to Commission rules on a 30-day comment period. Rate increases are generally made effective five days from the effective date of the decision. In the best of circumstances this process takes 30 to 60 days from filing of an application to the date rates are effective.

Common carrier rate decreases do not require formal applications. Instead carriers must file "cost justifications" with the TD. Cost justification filings must: (1) demonstrate that the rate will generate sufficient revenue to contribute to the carrier's profitability, (2) be accompanied by a summary of financial data, (3) include the prevailing wage standard in the labor cost element, and (4) meet specific provisions governing the use of subhaulers. Cost justification filings are calendared after a 30-day staff review period, followed by a 30-day public protest period. If a filing is accepted by the TD, the revised rates are effective after the second 30-day period.

Regulations are set forth in G.O. 147-A, which contains several provisions that afford carriers a degree of rate flexibility. A rate window allows carriers to change rates a maximum of 5% above or 5% below their base rates. Carriers establish base rates by adopting GACC rates or cost justifying rates. Once established the base rates may not be changed without cost showings, except in the case of contract carrier increases.

Carriers are also allowed to make minor technical changes to tariffs or contracts. The changes may result in rate increases or decreases, but no cost justification or formal application is required unless the changes affect a carrier's annual revenues by more than 1%. The staff review process is, however, much like that for cost justifications.

Under the current program a carrier can temporarily reduce rates to meet the rates of a competing carrier if it currently handles the traffic. These are called "me-too" rates. Common carriers cannot meet the rates of contract carriers under this scheme. The reduced rates may be made effective on the date filed. The filing must cite the source of the rate being met. Cost justifications for reduced rates must be filed within 60 days after their effective dates. However, new common carriers may file rates at GACC rate levels without cost justification.

G.O. 147-A also established the TFCI to measure annual industry-wide changes in carrier operating costs and adjust carrier base rates. All rates governed by G.O. 147-A, except dedicated contracts, must be adjusted by the change in the TFCI unless a separate filing is made to offset the change. Adjustments to base rates are mandatory if the change in the TFCI is greater than 1% (plus or minus) and permissive if less than 1%.

Contract carriers may enter into standard or dedicated contracts. Standard contract rate increases do not require approval by the Commission or TD staff and are effective on the date filed. Decreases are calendared, require that a cost justification be accepted by TD staff, and are effective on 30 days' notice.

Dedicated contracts, or exclusive use equipment agreements, offer contract carriers that dedicate equipment to one shipper the ability to charge any rate, subject to a profitability test. To pass the profitability test a carrier must: (1) have an expense ratio (expenses divided by revenues) of less than 100%, and (2) pay not less than the Commission's prevailing wage standard or demonstrate that its labor expenses compare favorably with the TFCI. These contracts must identify the dedicated equipment, be for a duration of not less than 30 days or more than one year, and contain a specific expiration date. Exclusive use is not strictly

defined in G.O. 147-A, but is interpreted to exclude use of the carrier's equipment for other shippers. Dedicated contracts, whether calling for rate increases or decreases, are effective on the date filed. They are generally calendared, although this is not required by G.O. 147-A.

In testimony on the record in this proceeding Alfred Kahn succinctly summarizes the dynamics of the general freight trucking industry:

> "The truck is a wonderfully versatile medium of transportation which can be here or there depending upon the demand, and the demand changes. It differs from one time to the next, from one commodity to the next, from one place to the next, and the beauty of a market economy is that that will be automatically recognized in the market." (Tr. 47:6322.)

The dynamic nature of the trucking market requires a regulatory program that can respond in a similar manner. We initiated this proceeding because we seriously doubted the ability of the current program to meet this challenge. Many of our concerns have been borne out by the record.

Our first concerns are about the inherent inefficiencies in the current regulatory program, beginning with practical problems. Although our current program was not designed to inhibit efficiency, apparently it does. We heard from shippers that are frustrated over the current program's rigid requirements for the classification and rating of commodities. Their frustrations are not related to carrier compensation, but deal with carriers' inability to implement a simplified rating system and contract program, due to complexity of filing requirements. Simplified contracts and rating systems would provide some shippers the opportunity to more efficiently manage and monitor their transportation costs.

The current cost justification procedure is another area with practical problems. Even supporters of the present regulatory program believe that changes are needed. They testified that it is not uncommon for a cost justification to take three to four months to process, and if a filing is not exactly like previously accepted filings it will probably be rejected.

Other parties argue that it is difficult to predict the results of the cost justification procedure, and that the process:

1. Is subjective; requirements often vary.

2. Results in fictitious traffic studies for some carriers, which are then relied upon in cost justifications.

3. Can be manipulated by carriers to justify rates that are not really cost based.

4. Uses prevailing wage data instead of actual labor costs, thus driving rates away from a true cost basis.

The cost justification procedure was developed to provide carriers the opportunity to individually establish rates which reflect their costs of service. However, in trying to achieve this we appear to have developed a complex procedure that encourages carriers to manipulate their costs, uses proxies where actual data is available, and inconsistently evaluates carrier submittals. Such clumsy procedures by themselves discourage carriers from requesting reasonable rate changes that would respond to market conditions.

Such complex rate procedures allow knowledgeable carriers an advantage over less sophisticated carriers, which is to be expected in a competitive business. However, such efforts could be redirected toward improving service to the public rather than satisfying bureaucratic requirements.

The current authorization of dedicated contracts seems to have limited usefulness. Dedicated contracts offer some carriers and shippers the ability to negotiate rates without Commission approval. However, because of the exclusive use restriction, these contracts are usually not attractive. Even in situations where dedicated contracts are cost-effective, the exclusive use restriction often causes equipment to be used inefficiently.

The use of the TFCI has both practical and theoretical problems. The TFCI was developed to allow transportation rates to automatically adjust for industry-wide changes in costs. Proponents of less restrictive rate regulation (Flexible Rate Proponents) argue that these annual rate adjustments:

1. Are mandatory, forcing some carriers to make rate changes that would not have normally occurred.

2. Have a six-month time lag in the application of recorded data which makes it difficult to negotiate contracts or discounts with shippers.

3. Fail to achieve cost-based pricing; averages and proxies are used instead of individual carrier costs.

4. Are an administrative burden. Not only are carriers required to file indexed rate changes, but if a carrier wants to use the rate window to avoid the TFCI change an additional filing is required.

Other criticisms of the present regulatory program focus on barriers to competition, resulting in inequities and economic inefficiency. Ready access to information is a key element in competitive markets, and the current program's tolerance of writein tariffs limits ready access. Write-in tariffs allow a shipper to write to a carrier to request a specific discount or rate which is less than the carrier's published rate. The shipper's request is not filed with the Commission.

This procedure is a defect in the current program. Write-in tariffs allow secret, shipper-specific rates. They prevent other shippers and carriers from knowing the rates they are competing against, and they place carriers without write-in tariffs at a competitive disadvantage. Since the discounts are secret, carriers can easily discriminate among customers.

Finally, the current regulatory program fosters unnecessary distinctions between present and new carriers of a given class of freight. A carrier that wants to match the reduced rate of a competitor must show that it already handles the traffic that applies to the reduced rate. If allowed to match the rate of a competitor, the carrier must then cost-justify its rate within 60 days, even if the competitor's rate is already cost-justified. Although this program element does offer a way for carriers to retain business, it does not allow carriers to effectively compete for new business. Before a carrier can compete for new business its

reduced rate must be cost-justified; because this process can take months, it stifles competition.

In summary, the current program is clumsy and inefficient. Carrier efforts to comply with program rules can only increase costs that are passed along to shippers and the eventual receivers of the freight. Commission intentions to create a system that is both efficient and fair have failed.

Policy Considerations

Goals of Truck Regulation

Throughout this proceeding there has been considerable argument over the purpose of regulation in the trucking industry. Parties favoring continuation of the current relatively rigid rate regulation, or even increased economic regulation, (Rigid Rate Proponents) and Flexible Rate Proponents both cite the need to provide the public with safe, reliable service at reasonable and nondiscriminatory rates. While this ultimate goal is common to all parties, they differ on intermediate goals.

Rigid Rate Proponents generally believe that to achieve the ultimate goal the trucking industry must be protected from: (1) destructive competition—claimed to be caused by sustained prices at a level below the cost of providing safe, reliable service, (2) predatory pricing—lowering prices, as in a price war, in order to drive competitors out of business for the purpose of subsequently raising prices to extract monopoly profits, and (3) shipper clout--unfair competition by which large shippers exercise market power to drive the prices of shipping their goods below cost.

Additionally, Rigid Rate Proponents argue that the public must be protected from: (1) price discrimination, (2) unsafe drivers and equipment, (3) poor service, and (4) monopoly pricing. Although these parties support additional safety regulation, they agree that the primary protection for both the trucking industry and the public is economic regulation.

Flexible Rate Proponents are also concerned with these issues, but believe the public will be adequately protected by a regulatory program that provides carriers with considerable rate flexibility.

These parties advocate less or no rate regulation, strict safety regulation, and the monitoring of prices and service.

We believe that each of the individual proposals by the many parties to this proceeding falls short of providing safe, reliable service at reasonable and nondiscriminatory rates. Our concerns are these:

"Destructive Competition"

Ad Hoc argues that without strict economic regulation we will return to the chaotic times of the late 1920s and early 1930s when destructive competition was rampant. No party disputes the destructive practices that occurred in that period. At that time the trucking industry was relatively young. Regular route carriers and railroads were economically regulated while contract carriers and carriers not operating between fixed termini or over regular routes were unregulated. During an era when jobs were scarce this led to the proliferation of unregulated carriers and fierce competition for the customers of regulated carriers and the railroads. The same economic factors that made jobs scarce also led to an oversupply of trucks. Reduced overall economic activity at that time, which we do not face today, could not support the capital stock of trucks, leading carriers to reduce rates below full costs. The intense competition from carriers with devalued equipment was harmful to the regulated industry, and eventually led to the regulation of contract and irregular route carriers. Rigid economic rate regulation for all carriers was one logical solution, but it was not the only answer then or today.

We see now that the most important factor contributing to the market disruptions of those times was the overall state of the economy. Because it is very unlikely that the economic conditions of the Depression will be repeated in the near future, we are reluctant to endorse any specific theory of "destructive competition". Rigid Rate Proponents believe that destructive pricing practices are a natural consequence of open competition and must be protected against. Flexible Rate Proponents believe that destructive competition is a misnomer; pricing below cost can be destructive, but it is not due to competition. We agree with the latter position. Economic circumstances can cause destructive

practices, but it cannot be said that competition by itself causes those practices. There is no evidence on this record that California's economic conditions will soon cause an oversupply of trucks and subsequent devaluation of capital sufficient to induce the destructive practices seen sixty years ago.

Although many changes have occurred since the mid-1930's, the general freight intrastate trucking industry in California still has relatively rigid rate regulation. Parties favoring the continuation of this regulation say that carriers with price flexibility will price below cost and destroy the trucking industry as we know it. On the other hand, the record shows that without economic regulation carriers in interstate markets and intrastate markets such as Arizona and Florida have continued to profit. We acknowledge that some carriers, given the freedom to do so, may price irrationally. If these carriers do so for any length of time, we expect them to go out of business. Business failures by ineffective competitors are inherent in a workably competitive market and can be expected in any industry where entry is relatively easy and inexpensive.[1] While this may be destructive to individual carriers, it is not destructive to the industry. The Arizona experience shows that the industry can survive without economic regulation. Efficient carriers that price according to their costs and provide safe, reliable service should not only survive, but prosper when allowed price flexibility and an equal opportunity to compete.

We conclude that specific regulatory protections against destructive pricing practices is not necessary, principally because the market conditions that induce such practices are extremely unlikely. As we will see, our adopted zone of reasonableness for common carriers will provide additional protections for the public, but those protections are incidental. Within the normal workings of competition in the trucking market rigid protections are not necessary. Absent extreme circumstances, a workably competitive trucking market does not require rigid protections. We will not

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[1] DRA testified that from 1983 to 1985, a period of lesser rate regulation in California, the trucking industry turnover rate was comparable to that of other small businesses in the country.

adopt specific regulatory goals concerning destructive pricing practices, beyond general encouragement of cost-based rates.

Monopoly Pricing

The principal reason for regulation of utility rates in general is to prevent monopoly pricing due to restriction of supply. If a utility market is workably competitive, rate regulation is not necessary to keep rates from rising above reasonable levels. If one provider tries to price its service too far above cost, other competing providers will offer the service at a lower and more reasonable rate. Because many elements of the trucking industry are naturally competitive, our goal is to assure that the adopted regulatory program maintains and promotes a workably competitive market.

Three conditions are sufficient to demonstrate workable competition in a market. First, there must be many buyers and sellers of the goods or services. The theoretical definition of perfect competition requires that no single buyer or seller has the market power to affect prices. Because no real market can be perfectly competitive, we rely on the subjective term "many" to describe workable, rather than perfect, competition. Second, entry and exit from the market must be easy. Third, the buyers and sellers must have access to sufficient information to make rational pricing and buying decisions.

If our adopted program allows these criteria to be met in the market, then no further regulatory rate restrictions are necessary to avoid monopoly pricing or encourage economic efficiency.

Predatory Pricing

As defined above, predatory pricing is the lowering of prices to drive competitors out of business, and subsequent raising of prices to extract monopoly profits. In an industry where entry is extremely difficult, predatory pricing is a valid concern. This record has clearly established that entry in the intrastate trucking industry is not difficult. While the cost of equipment and facilities may prohibit carriers from entering the interstate trucking markets on a large scale, the record does not demonstrate the existence of substantial barriers to entry into intrastate markets. Because there are many carriers in the California intrastate market and entry is

not difficult, we do not believe it is realistic to expect predatory pricing. Although our adopted regulatory program will provide some incidental protections against predatory pricing, the workings of market competition do much of the work for us. No formal protections directed at predatory pricing are required.

Shipper Pricing

There has been considerable testimony concerning the ability of large shippers to set transportation prices. Such shipper pricing is also known as shipper clout. The dangers of shipper pricing are that overall rates would be driven so low that carriers could not recover their costs, or that carriers would make up for losses induced by powerful shippers by charging higher rates to shippers with no market power. From an analytical perspective, the shipper pricing problem is similar to monopoly pricing. A monopoly market features a single or very few sellers of a product to many buyers. A monopsony market (shipper pricing) has a single or very few buyers from many sellers of a product.

The same market forces serve to protect against both situations. While large shippers may receive lower transportation prices, carriers that are not profitable at these rate levels will not remain in business or will decline to serve at the shipper's prices. (Carriers will not necessarily be forced out of business, because there are many shippers in the market.) Eventually, to receive reliable service, shippers will be forced to pay prices which cover a carrier's costs. In a competitive market we would expect large customers to drive the best bargain due to economies of scale. Likewise, in a competitive transportation industry, so long as economies of scale exist, large shippers should receive the lowest prices because of the number and size of their shipments.

Although we are concerned about discriminatory pricing, the economies of scale in serving large shippers is a natural force of a competitive market, and market power will be checked and controlled by market forces. We adopt no regulatory objective to artificially inhibit the natural market force which economies of scale allow for large shippers, as long as rates charged to those shippers are not discriminatory or do not cause price discrimination to other shippers. Those other shippers are protected from

subsidies to large shippers as long as their own markets are workably competitive.

Price Discrimination

No party supports discriminatory pricing, which is rate differences not justified by differences in costs or other conditions. We retain the goal of maintaining identical common carrier rates (by each carrier) for identical services. However, rate differences among shippers can be justified by differences in cost of service or other conditions. Article XII of the Constitution and PU §§ 453, 461.5 and 494 require nondiscriminatory common carrier rates. The standards for contract carriers are far less strict, as contract carriers can and do negotiate different rates for virtually identical service.

Rigid Rate Proponents imply that economic regulation and its system of cost justifications will prevent discrimination. Although we strive to achieve this goal, the complexity of the current system of economic regulation provides no assurances of success. One troublesome example of potential discrimination is write-in tariffs. Shippers can write in to carriers and request a discount, but these discounts are not evaluated for cost justification or discrimination. The terms for obtaining these discounts are not public information.

Parties recommending less or no economic regulation appear to be willing to let the market dictate fair, nondiscriminatory prices. Some claim that discrimination is not possible in a competitive market, on the theory that perfect information and the rational desire to maximize individual profits will keep all rates cost based. We do not share their complete confidence in the market and are unwilling to allow pricing freedom without safeguards. If we can determine that the market is workably competitive, public protections are still in order because shippers and carriers do not have perfect information and do not always behave rationally. However, our intention is to provide only necessary protections, without restraining prices so much as to cause inefficiency. For common carriers, as long as rates are confined to a zone of reasonableness, formal cost justification is not a needed safeguard.

It is our goal to prevent discrimination among common carriers. We will do so in part by requiring common carriers to hold themselves out to serve the public. We will specifically disallow tariffs written to serve a single shipper, but no specific geographic limits beyond that will be imposed. We will also order a phased elimination of all existing write-in tariffs. We will address discrimination allegations as they arise, and in time we will change tariff limitations if other rules become necessary.

PU § 3662 orders that minimum, maximum or minimum and maximum rates for contract carriers be nondiscriminatory. As long as our adopted program for contract carriers orders no such rates, it will comply with this mandate.

Service

There was considerable testimony concerning service to small and rural communities. Rigid Rate Proponents argue that interstate service to these communities has deteriorated under deregulation and that this would happen to intrastate service if deregulated. Flexible Rate Proponents dispute these claims and introduced evidence to support the conclusion that service will remain the same or improve if carriers are given pricing freedom.

No specific proposals concerning service were made, but Ad Hoc suggested that the Commission determine the division of revenues between carriers which interline, or transfer freight to other carriers for eventual delivery. The intent of this proposal is to increase the profitability of small carriers that serve small and rural communities.

The existence or nonexistence of economic regulation will not determine service levels to small and rural communities. It is not how rates are set, but whether they are compensatory at a given level of service, that determines carrier enthusiasm to serve a market segment. We continue to support adequate common carrier service as a regulatory goal. As discussed elsewhere in this decision, we will establish a minimum level of service for common carriers as a safeguard against inadequate and unreliable service.

Safety

It is undisputed that public safety on the state's highways cannot be compromised by any regulatory program. That has always been the Commission's goal, and we reiterate it now.

Generally, proponents of rigid rate regulation believe carriers operate in a safer manner under economic regulation than in a deregulated system. Proponents of flexible rate regulation dispute this claim. Both made specific safety proposals, which are detailed elsewhere in this decision. Therein we find the most effective way to improve safety is through direct safety regulation and enforcement.

Competition

The problems with the present regulatory program's ability to cope with today's transportation market are explained in the section entitled Analysis of Current Regulatory Program. These problems led us to consider a more flexible approach to rate regulation, on the notion that flexibility would reduce the complexities of current regulation. However, before turning our attention to the appropriate type of rate regulation we must address whether the general freight transportation market is workably competitive. In general, imperfect economic markets require closer regulatory attention than do competitive markets. In any regulated industry a basic goal is to mimic competition. If it can be demonstrated that the intrastate general freight market is workably competitive, then a more flexible regulatory program is justified.

As discussed in the *Monopoly Pricing* section of this decision, three conditions are sufficient to demonstrate that a market is workably competitive: (1) there are many buyers and sellers in the market, (2) entry and exit from the market is relatively easy, and (3) buyers and sellers have ready access to relevant information.

The evidence presented by DRA and others, as well as the Commission's own statistics on certificated common carriers and permitted contract carriers, are clearly convincing that there are many buyers and sellers in the intrastate general freight market.

For example, there are now more than 3000 intrastate common carriers in California (3,442 common carriers as of June 30, 1988). Only in the smallest market segments might there be so few carriers that competition would not drive rates toward costs, or so few shippers that service would be inadequate. These areas become candidates for regulatory protections not needed on major freight routes, if monitoring shows the need.

Quick, easy and inexpensive entry with small sunk costs required of competitors creates an ideal situation for competition, which will in turn enforce restraint upon pricing. Theoretically, a dominant firm will behave competitively if it fears entry by another firm with similar cost characteristics, even if the dominant firm has a very large market share. If the dominant firm does not react this way, other competitors will enter the market. In either case, customers have access to cost based rates. The record in this proceeding clearly indicates that entry into the intrastate general freight market and expansion into new areas are relatively easy and can involve relatively small capital costs. This is supported by the testimony of many parties (e.g. DRA, Coalition, CMA, FTC) and the number of entrants that receive operating authority from this Commission. From July 1, 1987 to June 30, 1988 there were 1,141 contract carriers and 260 common carriers receiving new authority.

Recovery of entry or expansion costs upon exit from the general freight market is not difficult. Exit costs depend on the extent to which investments can effectively be redeployed or sold in response to changes in market conditions. Transportation equipment and terminals have multiple uses and can be easily sold or transferred to new or existing carriers as well as other businesses. A competing firm or new entrant would likely purchase or lease an exiting firm's facilities, significantly decreasing the risk of losing entry investments. Ease of entry and exit is further demonstrated by the relatively small capital costs and minimal capital risks inherent in entering the trucking business.

Ready access to information is an element of competition that can be determined by regulation of market mechanics but is not dependent on regulation of rates. Without accessible rate information carriers may be able to discriminate against certain

shippers and maintain higher rates than could be charged if shippers had accurate information about all carriers' and shippers' rates. Everyday business relationships produce much competitive information. However, any regulatory program should encourage rate competition by promoting open rates for both common and contract carriers. Secret rates and discounts promote discrimination and discourage direct competition.

Because the sufficient economic conditions are convincingly met or can be promoted by a minimum of regulatory constraint, we find that the intrastate general freight trucking market is workably competitive.

Workable competition will protect shippers against unreasonable rates. If rates are too high, other competitors will take the business. If rates are too low, the carrier will go out of business.

Typically, a workably competitive market does not warrant rate regulation to produce just and reasonable rates. However, the Legislature has enacted statutes providing that the use of public highways for the transportation of property for compensation is a business affected with a public interest and the Commission should ensure just and reasonable rates and adequate, dependable, and safe service. This legislative mandate requires the Commission to impose a regulatory program that meets the statutory objectives, whether by flexible or rigid rate regulation, or in the case of contract carriers without rate regulation at all. For contract carriers the Commission has the authority to order no specific rates, so long as the statutory objectives are met.

In analyzing the current regulatory program we noted some major flaws that pose a significant barrier to maintaining reasonable rates and preventing discriminatory pricing. These flaws also inhibit the State's economy from fully benefiting from the services of a vital and vigorous for-hire trucking industry. If carriers are not allowed to respond to market conditions, they are prevented from operating efficiently, with the attendant risks of oversupply, waste of resources and stifling of innovation.

To better allow carriers to efficiently respond to market conditions and to meet the statutory objectives, we will adopt a regulatory program that recognizes the benefits of competition.

Although we believe that a more flexible system will work, we will monitor how effective that competition is in driving prices toward costs. The adopted program will provide for both rate flexibility and a monitoring plan. For common carriers, consistent with legal precedent, rate flexibility will be confined to a zone of reasonableness. For contract carriers no rate restrictions are necessary. The monitoring plan is intended to offer a mechanism for detecting and correcting any failure of market forces.

Our response to competitive realities in the trucking industry will help us to achieve the regulatory objectives mandated by the statutes. We believe that the public interest will be better served by permitting carriers flexibility in adjusting rates in response to the demand and constraints of a competitive market. Price flexibility will provide carriers the freedom to align prices more closely with their costs and should enable well-managed and efficient carriers to earn a reasonable return on their investments. The current regulatory program is overly protective of inefficient carriers, allowing them to earn a return on their investments while forcing more efficient carriers to price their services above costs.

An effective regulatory program would allow efficient use of resources and timely response to demand for services. The current program provides the wrong incentives for efficiency, erecting unneeded hurdles which translate into higher rates for shippers and consumers. We continue to strive for rate regulation that is efficient and fair. If fairness and equity goals can be met, then less regulation is preferable to more regulation, because less regulation is economically more efficient.

Further, the record demonstrates that similar trucking markets in other jurisdictions function efficiently when subject to price flexibility or economic deregulation. The evidence in this proceeding is clear and convincing that consumers and the economy generally will benefit from the substitution of market-set rates for government efforts to fix prices.

We are convinced that the workings of competition will produce just and reasonable rates, and that monitoring protections and ready access to rate information will quickly identify any rates that are not just and reasonable. Therefore we will not require

that individual carriers file formal applications to change tariff rates within the adopted zone of reasonableness or to change contract rates, because there is no need for individual findings to determine that such rates are just and reasonable. The workings of competition and the limits in the regulatory program adopted herein, along with our finding that the approved rates are just and reasonable, will suffice. This rate flexibility will be confined to a zone of reasonableness for common carriers, consonant with legal precedent.

When the Commission first began to require separate findings and orders in support of individual rate applications, that process was both necessary to remedy market imperfections and effective in regulation of relatively few carriers. Today conditions have changed. The market is workably competitive, and therefore case-by-case cost justification is unnecessary. As well, the large number of carriers makes individual litigation of rate applications burdensome and ineffective.

Legal Authority for a Flexible Rate System

Rigid Rate Proponents argue that the Constitution of the State of California (Constitution) and the Public Utilities Code (PU) require rigid rate regulation. More specifically, Rigid Rate Proponents rely on Constitution Article XII, §§ 3 and 4, and PU §§ 451, 452, 453, 454, 455, 460, 461.5, 486, 491, 494, 726, 730, 731, 3662 and 3666. The full text of the applicable sections of the Constitution and the PU Code are attached as Appendix B to this decision.

Based on their interpretation of the these constitutional and statutory sections, Rigid Rate Proponents further argue that the Commission must provide a regulatory program for common and contract carriers that requires:

1. Commission approval prior to any change in common carrier and contract carrier rates.

2. Commission findings that common carrier and contract carrier rates are just and reasonable.

3. Thirty days' public notice prior to the effective date of common carrier and contract carrier rates.

4. Common carrier and contract carrier rates to be public documents filed with the Commission.

5. Common carriers and contract carriers to charge non-discriminatory rates unless justified by the transportation conditions.

6. Common carriers to provide adequate service.

Rigid Rate Proponents contend that a regulatory program that does not meet the first four "requirements" above would not protect the public from poor service, unreasonable rates and discriminatory practices. Moreover, Rigid Rate Proponents argue that the Commission is prohibited by the above statutes from issuing a blanket-authorizing decision and must act upon individual carrier showings of justification.

Flexible Rate Proponents paint a very different picture. They believe that Rigid Rate Proponents are too narrow in their reading of Constitution, Article XII, § 4 and PU § 454 with respect to the flexibility the Commission has to decide on the showing and finding required by those sections. They argue that in setting a rate the Commission can choose its own criteria or methods, provided they are reasonable. Flexible Rate Proponents assert that the Constitution and the Public Utilities Code give the Commission wide latitude on precisely what kind of regulatory system it will impose and that the California Supreme Court has confirmed the Commission's considerable discretion in setting rates for the transportation of property, citing *California Trucking Association v. Public Utilities Commission* (1977) 19 Cal. 3d 240, 246 & n.10, 247 *(CTA v. PUC)*.

In addition, Flexible Rate Proponents point out that it is well established that a reasonable common carrier rate or charge in any given situation may be determined within a zone of reasonableness and cite the following:

> "There is a zone of reasonableness within which common carriers, so long as statutory restrictions are not transgressed, may and should exercise discretion in establishing their rates. The upper limits of that zone are represented by the level at which the rates would be above the value of the service, or be

excessive. The lower limits are fixed, generally, by the point at which the rates would fail to contribute revenue above the outof-pocket cost of performing the service, would cast an undue burden on other traffic, or would be harmful to the public interest." (50 CPUC 632.)

Flexible Rate Proponents argue that through the mechanism of a zone of reasonableness common carrier rates can be established without the need for an individual review of each increase or decrease. They contend that, instead, a rate zone can be preapproved by a finding that the zone is reasonable, is in the public interest, and fulfills the needs of commerce.

Flexible Rate Proponents contend that a zone of reasonableness for common carriers of general freight is consistent with PU § 454.2. That section provides for blanket authorizatioin of rate changes for common carrier passenger stage corporations within a zone of rate freedom, based upon an advance finding that the service involved is competitive. Flexible Rate Proponents argue that, although general freight is not included in PU § 454.2, the implication is that the Constitution provides sufficient latitude to implement a regulatory procedure for common carriers that incorporates a zone of reasonableness. Flexible Rate Proponents therefore argue that because a zone of reasonableness is permissible under the constitutional language, it is also permissible under the substantially identical language of § 454.

According to Flexible Rate Proponents, the record in this proceeding shows that a flexible rate program is better suited to today's economic conditions in the trucking industry. Thus, Flexible Rate Proponents claim that the evidence in this proceeding constitutes a showing before the Commission that the proposed rate changes are justified. They assert that the evidence will support findings that: (1) the carriage of general freight is naturally competitive, (2) individual carriers cannot garner sufficient market power to exact unreasonably high or discriminatory prices, and (3) predatory pricing and destructive competition are unlikely to result. They therefore contend that the Commission can find that the proposed rate changes are justified and grant blanket authorization for individual carriers to raise and lower

rates. A blanket authorization would eliminate the need for additional showings before or decisions by the Commission.

Flexible Rate Proponents argue that the Commission's complaint and protest procedures will act as further checks and balances against unreasonable rate changes. Flexible Rate Proponents also cite antitrust laws as additional controls to insure that the benefits of competition are preserved and promoted. Among the laws referenced are the Sherman Antitrust Act, Federal Trade Commission Act, Cartwright Act, Unfair Practices Act, and Robinson-Patman Act. Generally, these Acts provide that pricing below cost with the intent to reduce or eliminate competition is unlawful. The remedies are varied and potent. Both Federal and State authorities prosecute these violations. Violation is a criminal offense. Public prosecutors at the State level may bring an additional action providing for civil penalties, restitution and attorneys' fees. The recompense of these civil penalties, which can amount to millions of dollars, makes these actions particularly attractive to public authorities.

With respect to notice requirements before common carrier rates can become effective, Flexible Rate Proponents point out that under PU § 455 the Commission can grant authority for rate decreases to become effective less than 30 days after filing. In addition, Flexible Rate Proponents assert that an order in this proceeding can meet the requirements of PU § 491. That section permits the Commission for good cause to allow rate changes on less than 30 days' notice by an order which: (1) specifies the changes to be made, (2) identifies when the changes will occur, and (3) sets forth the manner in which changes shall be filed and published. We agree with Flexible Rate Proponents that we can issue an order making rates effective less than 30 days after filing.

We also agree with Flexible Rate Proponents that the Commission has considerable discretion in setting rates for highway contract carriers. In *CTA v. PUC* the California Supreme Court construed PU § 3662 which provides that "[t]he commission shall . . . establish or approve just, reasonable, and nondiscriminatory maximum or minimum or maximum and minimum rates to be charged by any highway permit carrier". The Court determined that this language vests the Commission with the discre-

tion to set maximum or minimum rates, "*or no rate at all.*" (19 Cal. 3d at 246 n.10, emphasis added.) The Court also held that PU § 726 implies the standard by which minimum rates are to be determined, but does not require that any such rates be set. (19 Cal. 3d at 247.)

We are also persuaded by Flexible Rate Proponents' arguments that the Constitution and the Public Utilities Code provisions cited above permit the Commission to authorize rate flexibility for common carriers within a zone of reasonableness, based upon a finding that workable competition exists and that serious problems in the areas of regulatory concern outlined above will not result. Both enactment of PU § 454.2 and language of PU § 454 support this conclusion.

Article XII § 4 of the Constitution states in part, "A transportation company may not raise a rate or incidental charge except after a showing to and a decision by the commission that the increase is justified". Notwithstanding this language, PU § 454.2 permits blanket authorization of rate changes for common carrier passenger stage corporations within a zone of rate freedom, based upon an advance finding that the service involved is competitive. PU § 454.2 further provides that an adjustment in rates or charges within such a zone of rate freedom established by the commission is just and reasonable. Thus, PU § 454.2 clarifies the type of showing permitted by the Constitution.

PU § 454 provides, with certain exceptions (forexample, where there is no rate increase), that "no public utility shall change any rate . . . except upon a showing before the commission and a finding by the commission that the new rate is justified." We agree with Flexible Rate Proponents that this language, insofar as it requires a showing and a Commission finding that rates are justified, is substantially identical to the constitutional language requiring a showing and a Commission decision that rates are justified. Thus we conclude that § 454's requirement of a showing and finding, like the constitutional provision, allows the Commission to grant blanket authorization for common carrier rate flexibility within a zone of reasonableness where there is a showing of competition.

This conclusion is further supported by the language of Constitution, Article XII, § 4 and PU § 454. Neither of those sections expressly requires individualized showings of justification. Rather, the gist of those sections is that common carrier rate increases require prior Commission authorization. Thus, we conclude that those sections permit the Commission to grant prior authorization for rate flexibility within a zone of reasonableness, where a showing justifying such rate flexibility has been made.

The California Supreme Court's decision in *CTA v. PUC* further confirms the Commission's considerable discretion in setting highway common carrier rates. That decision construed not only PU § 3662, applicable to highway contract carriers, but also § 726, applicable to highway common carriers, in such a way as to leave the Commission with considerable discretion in deciding how to regulate common carrier rates.[2]

In short, we conclude that: (1) the Commission is not restricted to a cost-of-service form of regulation, and (2) there is ample authority to establish an appropriate and effective form of flexible rate regulation.

Contract vs. Common Carriage

An important element of the adopted regulatory program is the balance of incentives between common and contract carriage. We should not allow common and contract carriers to compete freely against each other because common carriers are held to higher standards for rates and service. We must separate these markets by identifying separate conditions of service. The balance parallels the classic policy balance of economic efficiency vs. fairness or equity among the participants in a market.

In promoting safe, reliable service at reasonable and nondiscriminatory rates we could emphasize service and price discrimi-

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[2] *Pacific Telephone and Telegraph Company v. Public Utilities Commission* (1965) 62 Cal. 2d 634, 647 similarly reflects the Commission's considerable discretion in ratemaking:

> "Thus the responsibility for rate fixing, insofar as the law permits and requires, is placed with the commission, and unless its action is clearly shown to be confiscatory the courts will not interfere."

nation protections by providing incentives for common carriage, at the risk of loss of economic efficiency. Encouraging common carriage at the expense of contract carriage would improve consumer protections because all carrier obligations would be explicit in fixed tariffs, but it would prevent carriers and shippers from making private arrangements that might increase carrier efficiency and thus lower prices. On the other hand emphasis on low rates could be provided by incentives for contract carriage, at the risk of price discrimination and poor service to some market segments.

We have heard from shippers and carriers who are dissatisfied with their opportunities to set special, efficient rates in specific situations. In many such cases it is special shipper obligations which drive the efficiencies that allow lower rates.

In striking the balance we are restrained by law and sound public policy to maintain a viable, working common carriage system. We cannot know with certainty that a viable common carriage system will survive if all the incentives are in favor of contract carriage. Common carriage must work efficiently to serve customer demand, not merely exist as an empty set of rules built to satisfy legal requirements. The most ardent of flexible rate proponents claim that effective common carriage will always survive because there are many carriers that will choose common carriage as a marketing tool in serving small communities or market segments. However, the evidence does not convince us to make that finding, and the consequences of ordering such an experiment are too risky. We will allow greater freedom than is currently granted for contract carriage, but not without limits.

We will effect the balance of incentives for common and contract carriage in these ways: (1) by ordering different effective dates for the two types of carriage, and (2) by defining the applicability of contract carriage. These are the two controls that will in large part determine how much freight actually moves under common or contract carriage. Our choices in setting these controls will be discussed in the *Adopted Regulatory Program* section of this decision. The applicability of the zone of reasonableness to common carriers but not contract carriers is a distinction driven by legal precedent, not our inclinations in balancing

incentives for two types of carriage. As will be discussed in the *Limits to Zone of Reasonableness* section, the restrictions of the zone do little to favor contract over common carriage.

Zone of Reasonableness

The evidence in this proceeding strongly indicates that competition is effective, and market forces along with some protections to ensure fairness will maintain prices at reasonable levels. For contract carriers we will allow unlimited rate flexibility while ensuring that contract carriers do not provide common carrier service under the guise of contract carriage. The statutes and case law provide a more restrictive framework for regulating common carrier rates. See California Constitution, Article XII, Sec. 4, PU §§ 452 and 454. As we noted in the Legal Authority for a Flexible Rate System section:

> "There is a zone of reasonableness within which common carriers, so long as statutory restrictions are not transgressed, may and should exercise discretion in establishing their rates." (50 CPUC 632.)

We will establish a zone of reasonableness for common carriers, and for all carriers we will monitor markets to assure that competition is controlling market behavior.

To be useful to common carriers, the limits of the zone must be sufficient to permit a fair opportunity to raise or lower prices to respond to market conditions. There must be enough latitude to allow carriers to respond to changes in the economy such as increases and decreases in fuel prices. In addition to meeting legal requirements, the zone of reasonableness can be designed to provide incidental protections against claimed market abuses. These objectives can be achieved by setting a ceiling on the amount an individual rate can rise within a specified time, and by setting a floor price below which rates cannot be reduced. Increases greater than the ceiling or decreases below the floor can be requested by filing an application with appropriate justification. Naturally, if a general emergency occurred, the limits to the zone could be temporarily changed.

The limits to the zone are defined first by legal precedent. In order to realize additional protections against possible market problems, we will analyze the market inefficiencies that might be encountered. The claimed dangers are predatory pricing and the vaguely defined destructive competition.

The upper end of the zone will serve to stabilize rates and restrain predatory pricing. To succeed at predatory pricing a carrier must first drive competitors out of the market by lowering prices and subsequently raise prices above reasonable costs. A yearly percent increase limitation would: (1) allow carriers flexibility to track increases in costs, and (2) prevent the second step of the predatory pricing process, especially if the reduced price in the first step becomes the base price for the increase limitation. There is no convincing evidence that predatory pricing has existed or could exist in the California intrastate market. In any event, the upper limit of the zone will preclude even this remote possibility in the common carrier market. The upper end of the zone will serve to restrain prices, but competition is most important in keeping rates at reasonable levels. Without an upper limit a carrier could raise rates in hopes of increasing profits, but in a competitive market that carrier will simply lose business as other carriers take the freight by charging lower, cost-based rates.

In setting the lower end of the zone we will rely on the terms of 50 CPUC 632-633 cited previously. The three limitations therein are that rates: (1) cover out-of-pocket costs, (2) do not unduly burden other traffic, and (3) are not harmful to the public interest. We will order that common carrier rates shall not fall below a floor price. The floor will be based on a minimum level of variable operating costs, excluding all capital and other fixed costs. As will be discussed in the *Safety and Entry Requirements* section below, we do not believe that safety is compromised by rate flexibility. However, the definitions of variable costs will be stretched to include insurance costs and as much safety costs as can reasonably be accommodated.

We have used "out-of-pocket" costs in the past, explicitly excluding overhead expense, other fixed costs and ownership costs such as depreciation, certain taxes and return on investment. In establishing our price floor, we choose to use a minimum level of

variable costs because it will cover at least the legally required "out-of-pocket" costs and is consistent with our previous decisions. The fact that the general freight market is workably competitive precludes undue burden on other traffic. Although we do not endorse claimed theories that rate flexibility will cause market abuses, the adopted zone of reasonableness will provide incidental protections against public harm.

The lower end of the zone will provide some additional protection against predatory or destructive pricing below cost. Underpricing induced by severe economic circumstances or large scale irrational carrier behavior, which occurred during the Depression but which we do not now anticipate, might cause inadequate wages, poor maintenance or market instability, all of which are serious concerns.

For the present we will develop measures of variable cost using data from within the current TFCI. We will order hearings to investigate alternative measures of variable cost and to determine an updating procedure for future floor prices. The updating may be done by subsequent workshops and Commission resolution, or through the hearing process; we will decide this issue in the upcoming hearings.

Because the floor excludes all fixed costs we anticipate that it will not be used for rate indexing by carriers. We have learned elsewhere in the transportation industry that minimum rates set too high become de facto maximum rates as well, generating vigorous and largely unnecessary dispute. We hope that in the future calculation of floor prices will be less contentious.

In summary, the upper limit of the zone of reasonableness for common carriers is an annual percentage cap on rate increases, and the lower bound is a minimum level of variable costs. The zone of reasonableness meets legal requirements, provides pricing flexibility, and by allowing carriers to respond to market changes encourages rational carrier pricing. Carriers have strong incentives for cost-based pricing, and both shippers and carriers are provided incidental protections against the claimed market abuses of predatory pricing and irrationally low prices. Large common

carrier rate changes that could be challenged as unreasonable require an application and case-by-case justification.

A zone of reasonableness is not required by law for contract carriers, nor is it necessary on policy grounds. There is currently no limit on contract carrier price increases, and we see no reason to impose one. The current requirement that contract rates and rate decreases be cost justified is not necessary. The present economic outlook and the workings of competition provide ample protection against claimed future destructive pricing and predatory pricing.

Safety and Entry Requirements

Prior to September 20, 1963 the Commission administered safety regulations for for-hire motor carriers. In 1963 this responsibility was transferred to CHP by legislative action. PU § 767 (now § 768) was amended to provide that "the commission shall not regulate the safety of operation of passenger stage corporations, highway common carriers, and petroleum irregular route carriers."

Following this jurisdictional transfer, the Commission assumed a supporting role in safety by suspending or revoking the operating authority of carriers which the CHP would identify as unsafe. In 1986 the Legislature amended PU § 768 to state, "The Department of the California Highway Patrol shall have the primary responsibility for the regulation of the safety of operations of passenger stage corporations, highway common carriers, and other motor carriers. The commission shall cooperate with the Department of the California Highway Patrol to ensure safe operation of these carriers." More recent legislation, discussed below, continues to stress the importance of the Commission's role in safety.

Because the positions and arguments of many parties are similar, we will segregate them into two groups—those who favor rate regulation to improve highway safety, and those who believe that direct safety enforcement is the best approach to improve highway safety.

Parties Supporting Rate Regulation

In its direct showing CTA presented four witnesses to address driver and truck safety issues. Based on their testimony, CTA's policy witness recommended that the Commission:

1. Develop a special task force of industry and government representatives to establish minimum driver training standards acceptable for the for-hire carrier industry.

2. Join the industry in proposing realistic drug testing qualifications for drivers.

3. Work with Air Quality Management Districts to decrease congestion through truck pricing practices.

4. Require carriers with low safety scores to demonstrate that requested rate reductions will measurably improve the carrier's safety score.

5. Require all contracts to include a provision which binds the shipper to the carrier and makes the shipper co-liable for all accidents arising from the carrier's performance for the contract shipper.

Additionally, CTA's policy witness testified that in conformance with AB 3490 (Stats. 1988, Ch. 1175) the Commission should establish regulations for new entrants which require them to:

1. Be financially and organizationally capable of conducting an operation within the rules and regulations of the CHP.

2. Be committed to observing the hours of service regulations for all employees and subhaulers operating vehicles under the applicant's operating authority.

3. Have a Commercial Vehicle Safety Alliance sticker for each vehicle and a preventive maintenance program that conforms with CHP regulations.

4. Participate in the DMV's driver pull notice program and in a program to regularly check the driving records of all

employees and subhaulers operating vehicles which require a class 1 driver license.

5. Have a safety education and training program for all employees and subhaulers operating vehicles under the applicant's operating authority.

6. Pass a written test to ascertain the applicant's knowledge of vehicle maintenance standards.

Convinced that rate regulation and safety are related and that police enforcement cannot alone compensate for safety problems, CTA developed a safety score to predict carrier accident and citation rates from carrier income statements. CTA argued that safety performance is affected by a carrier's operating margin, driver labor as a percent of revenue and expenses, and purchased transportation as a percent of expenses. From this, CTA concluded that carrier safety performance could be predicted by the profitability and driver compensation practices of trucking firms. CTA claims that the safety scores developed from these factors have their greatest predictive accuracy at the extremes (e.g. carriers with the lowest scores present the most danger on the highways) and recommends limiting rate freedom for carriers that rank in the lower one-third.

Additionally, CTA notes that over 90% of truck-at-fault accidents are caused by driver error and attributes this to lower driver wages and deregulation.

Ad Hoc argues that less restrictive rate regulation places economic pressure on carriers which causes them to overwork drivers, reduce maintenance, and violate safety laws. Ad Hoc supports this argument by asserting that safety declined during the period of lessened rate regulation, 1981-1986. Finally, Ad Hoc does not support the contention that direct enforcement is the most effective means of providing safety to the public, and claims that rate regulation is needed to ensure safety.

WCFTB is convinced that unregulated carriers have a worse safety record than regulated carriers and rejects the evidence that a correlation does not exist between economic regulation and safety. WCFTB is also opposed to the regulatory proposals which increase rate flexibility, on the grounds that many carriers will

experience extreme hardship and safety will deteriorate. These concerns combined with recent safety legislation cause WCFTB to recommend that the Commission conduct a more comprehensive investigation into the effects of DRA's proposal.

Teamsters, NMFTA and Hegarty argue that much of the trucking industry has not achieved a sufficient level of truck safety. These parties believe that flexible rate regulation would place downward pressure on rates and wages, cause carriers to reduce repair and maintenance expense, and make it difficult to replace aging equipment and attract well-qualified drivers. Additionally, these parties seriously doubt that direct enforcement alone will be sufficient to keep the highways safe.

Parties Supporting Direct Enforcement

DRA contends that a direct link between rate regulation and safety does not exist, and cites the lack of evidence which would correlate accident data with rate regulation to support this claim. DRA supports its claim with studies on the profitability of unregulated vs. regulated carriage during the 1980-1986 transition period, correlations between profitability and regulation, and the evidence presented by FTC in this proceeding.

DRA argues that direct safety enforcement is the most cost effective method of protecting the public from irresponsible carriers. Unsafe operations can cause unreliable service and result in higher rates for liability and worker's compensation insurance. DRA believes that carriers seeking to operate profitably will operate safely because safety pays. DRA supports safety programs that suspend or revoke carrier operating authority to ensure compliance with insurance requirements, CHP's safety inspection standards and maintenance of safety related records. Finally, DRA concludes that safety enforcement is the most effective means for improving safety. DRA recommends the Commission enhance direct safety enforcement by:

1. Providing CHP yearly carrier mileage data for computing carrier accident and citation rates using CHP's MISTER records.

2. Working with CHP to develop a numbering system which allows intrastate regulated motor carriers to be identi-

fied in CHP's MISTER records by a single number in place of both a Commission and CHP number.

3. Augmenting the list of owner-operators, required by AB 2706, with carriers that receive subhaul only revenue, if necessary.

4. Working with CHP to implement recent legislation which requires joint action.

In response to CTA's research on highway safety DRA argues that the safety score methodology is flawed and at best only a preliminary indicator of safety. Specifically, DRA claims that CTA's research has severe database, variable and methodological problems that render the findings inaccurate and the conclusions invalid.

The Coalition supports direct enforcement as the most effective method of improving highway safety, and references recent safety legislation as being consistent with this position. The Coalition also believes that safety is cost-effective, citing carrier testimony that safety programs reduce insurance costs and help avoid CHP citations.

The Coalition has many of the same concerns with CTA's safety score methodology as DRA. First, the Coalition challenges CTA's logic which favors carriers that do not use subhaulers. Second, the Coalition identifies the application of inconsistent data (interstate and intrastate miles are used to compute accident and citation rates based upon intrastate-only accident and citation experiences). Third, CTA's statistical methodology is extremely sensitive to small variations in data. The Coalition concludes that CTA's safety score proposal and underlying studies are not supportable.

Fischer contends that there is no conclusive proof that flexible rate regulation will lead to financial distress sufficient to adversely affect safety. Similarly, Fischer argues that there is no convincing evidence that continuing the current program will have a positive effect on safety. Finally, Fischer provides the following quote from CTA's witness Garland Chow to support these conclusions:

"The issue of how economic regulation impacts safety is still unanswered." (Exhibit 185, p. 4.)

CPIL also argues that there is not a direct correlation between rate regulation and highway safety. If such a correlation existed, CPIL concludes that carriers would have to receive excess profits to improve safety. CPIL proposes a targeted approach to safety regulation and recommends that the Commission work with other agencies to prevent regulatory overlap and optimize use of resources.

CMA, NSSTC and Mike Conrotto Trucking support direct enforcement as the best method of improving highway safety and argue that accident data shows little correlation between rate regulation and safety. Furthermore, these parties contend that safety is an enhancement to profits through lower insurance costs, lower CHP fines and lower risk.

Finally, CMA claims that the data base for CTA's safety score proposal has fundamental flaws and that the safety score is a poor predictor of accident and citation experience. CMA believes that the best predictor of a carrier's future safety record is the carrier's current safety record.

Safety Legislation

Recently enacted State legislation has significantly strengthened safety regulation. SB 2594 (Stats. 1988, Ch. 1509) put into effect commercial driver license requirements from the Federal Commercial Motor Vehicle Safety Act of 1986 (Title XII of PL 99-570). In compliance with this legislation DMV established more stringent testing and licensing requirements and increased sanctions for serious traffic violations.

AB 3490 (Stats. 1988, Ch. 1175) specifies additional entry requirements for new intrastate regulated motor carriers. This legislation mandates that new entrants and transferees must:

1. Be financially and organizationally able to conduct an operation that complies with the rules and regulations of the CHP.

2. Commit to observing the hours of service regulations.

3. Have a preventive maintenance program for its vehicles that conforms to CHP regulations.

4. Participate in a program to regularly check the driving records of all employees and subhaulers which operate vehicles requiring a class 1 driver's license.

5. Have a safety education and training program for all employee and subhauler drivers.

6. Maintain vehicles in a safe operating condition and in compliance with the safety provisions of the Vehicle Code and regulations in Title 13 of the California Code of Regulations.

7. File with the Commission a certificate of workers' compensation insurance coverage for employees or a Division of Industrial Relations certificate of consent to selfinsure.

8. Provide the Commission with the address of an office or terminal where documents supporting these requirements can be inspected.

Another recently enacted safety law, AB 3489 (Stats. 1988, Ch. 916) as amended by AB 2097 (Stats. 1989, Ch. 1216), formalizes the CHP/Commission suspension process for carriers not meeting the State's safety requirements. This legislation also requires the Commission to submit to CHP and the carrier's insurer a list of each intrastate permit carrier's equipment from the preceding year. Carriers who have failed to obtain insurance for all their vehicles may be fined and/or have their operating authority suspended.

Concerns about carrier safety were also addressed in AB 2706 (Stats. 1988, Ch. 1586) amended by AB 2097 (Stats. 1989, Ch. 1216). These statutes require commercial carriers to inspect their equipment at least every 90 days and to schedule a CHP terminal inspection at least every 25 months. An unsatisfactory terminal rating can result in suspension or revocation of the carrier's operating authority.

AB 2706 also requires the Commission to annually identify owner-operators and send a list of these carriers along with their commercial driver's license numbers to DMV. DMV must notify

the Commission when an owner-operator's driver's license is suspended or revoked, and the Commission must act to suspend the carrier's operating authority.

Finally, under this legislation carriers must also participate in DMV's pull-notice program and check the driving records of all class 1 and 2 (class A and B if licensed after January 1, 1989) drivers at least once a year. Carriers are subject to fines and/or imprisonment for employing a driver without a valid commercial driver's license.

In addition to the legislation that strengthens safety standards, SB 2876 (Stats 1988, Ch. 1596) mandates that CHP: (1) perform additional annual roadside inspections of commercial vehicles, and (2) report on the feasibility of implementing an incentive program for commercial drivers with excellent records.

Agency Responsibilities

Although CHP has primary responsibility for motor carrier safety, other agencies have complementary roles. Generally, CHP is charged with enforcing the rules of the road, setting safety standards for commercial carrier operations, and inspecting carrier operations.

The Commission has responsibility to ensure that new carriers are financially fit and able to conduct safe operations. Additionally, the Commission coordinates with other agencies by suspending the operating authority of unsafe carriers and owneroperators without a valid driver's license and by providing safety related data.

DMV is responsible for licensing standards and procedures. This includes furnishing information to the Commission on the status of owner-operator driver's licenses and oversight of commercial driver training programs, including driving schools.

The Department of Health Services is charged with registering carriers of hazardous waste materials and enforcing special hazardous waste transportation rules. CHP also oversees hazardous material carriers. The table below identifies motor carrier safety programs and the responsible State agencies.

TABLE 2

MOTOR CARRIER SAFETY PROGRAMS FOR
CARRIERS OPERATING ON CALIFORNIA HIGHWAYS

	Private Carriers	Intrastate Exempt/Regulated	Interstate Exempt	Interstate Regulated (ICC)	Hazardous Materials/Waste Carrier
Highway Rules and Regulation Enforcement	CHP	CHP	CHP	CHP	CHP
Carrier Terminal Inspections	CHP	CHP	(Ca. Domiciled) CHP	(Ca. Domiciled) CHP	CHP & DHS
Inspection and Mobile Road Facility Carrier Checks	CHP	CHP & PUC	CHP & PUC	CHP & PUC	CHP
Issuance and Suspension/Revocation of Operating Authority	—	PUC	(Registration) PUC	(Registration) PUC	DHS & CHP
Auditing Safety Records	CHP	CHP & PUC	—	—	CHP & DHS & DOT
Issuing Driver License	DMV	DMV	(Ca. Domiciled) DMV	(Ca. Domiciled) DMV	DMV
Insurance Requirement Enforcement	DMV(1)	PUC	PUC	ICC	PUC & DHS & DOT

(1) Statutory Requirement without enforcement.

Discussion

The relationship between safety and rate regulation was one of the more heavily contested issues. Rigid Rate Proponents argue that rate regulation results in safer carriers and that financially healthy carriers spend more on safety. Stated differently, they argue that higher carrier revenues result in more dedication of those revenues to safety-related expenses.

This argument fails for several reasons. Rate regulation alone cannot ensure higher carrier revenues. To do so it must be accompanied by: (1) restricted entry to prevent overcapacity, and (2) rates that yield revenues higher than a workably competitive market. The rigid rate regulation proposals in this proceeding do not address the interaction between carrier revenues and capacity. Because higher rates will entice more entrants, rigid rate regulation without limited entry will do little for carrier revenues. Furthermore, the current and proposed rigid rate programs do not restrict entry and cannot prevent overcapacity if rates are set to provide higher revenues than a workably competitive market. From this analysis we conclude that the current and proposed rigid rate programs will not result in higher revenues or safety expenditures than those of a workably competitive market.

Rigid rate regulation is an imperfect approach to safety. Without carrier revenues in excess of competitive market revenues there is no increase in financial ability to make safety expenditures. Even if there were higher carrier revenues, carriers are not required to increase safety expenditures; carriers allocate operating revenues in their own best interest. Commissioner Calvo recognized this in his concurrence to D.86-04-045:

> "Regardless of what rates carriers charge, profits can always be increased by reducing costs through lower levels of maintenance and less rigid adherence to safe operating practices. Thus rate regulation is at best an imperfect tool to achieve safety goals."

Consistent with this logic, the credible evidence in this proceeding demonstrates that rigid rate regulation will not improve safety. Our safety efforts will be applied to direct enforcement programs.

We agree with Commissioner Calvo's statement, and believe the Legislature, by enacting tough safety requirements that provide for direct safety regulation and enforcement, also recognized that rate regulation is not the solution to safety problems. We commend and fully support the Legislature in this endeavor and will allocate our resources to enforce these new safety requirements.

We will actively participate in the safety task force established in response to Senate Concurrent Resolution 67. The task force is directed to study methods of improving heavy commercial vehicle and driver safety, including improved coordination among State agencies and commissions having jurisdiction and responsibility for trucking safety. Besides the Commission, the task force includes representatives of CHP, DMV, Office of Traffic Safety in the Business, Transportation and Housing Agency, Department of Transportation, labor organizations, various segments of the trucking and shipping industries, and motor vehicle owners' and operators' organizations.

Finally, we will act to protect the public safety in three additional ways. First, in conformance with AB 3490 we are establishing specific guidelines and criteria to ensure that new carriers are financially viable and operate in a safe manner. Although existing carriers are not impacted by AB 3490's entry requirements, we place the industry on notice that this subject will be addressed in a subsequent proceeding. We believe AB 3490 provides the public needed protection with respect to new carriers and that, where appropriate, existing carriers should meet similar standards.

Second, the Commission staff has an ongoing responsibility to investigate carrier operations for compliance with Commission requirements and in response to public complaints. Field offices are located throughout the State to fulfill this responsibility. We will direct the Commission staff in the course of these investigations to inspect new carrier driver education and training program records for compliance with State law. Where violations are found the Commission staff should take steps to ensure carrier compliance and recommend sanctions when necessary.

Third, the record reflects that some carriers continue to operate after the suspension or revocation of their operating authority. Although Commission records indicate which carriers hold valid operating authority, this information is not readily available to the public. We believe the public will be better served and protected if this information is easily accessible. Therefore, we will provide a toll free telephone number which the public can use to verify a carrier's operating authority.

Adopted Regulatory Program

Our policy is to establish a regulatory program which ensures that carriers provide the public with competitive and nondiscriminatory rates, good service, and safe drivers and equipment. As explained above, we believe that the best way to implement this policy is through flexible rate regulation and stronger noneconomic regulation. Where regulation is not needed to achieve this policy, none will be provided. Consistent with this, the following regulatory program will be adopted:

Common Carrier Tariff Rates

Common carriers may individually set rates within a zone of reasonableness without further Commission approval. The upper end of the zone of reasonableness is cumulative rate increases not greater than 10% over a 12-month period. The lower bound of the zone is a minimum level of variable costs.

Collective ratemaking under § 496 of the Public Utilities Code and authorization of rates outside the zone of reasonableness require a formal application.

Rates withdrawn or amended within 30 days shall have no effect on the 10% upward rate limitation.

All rates shall be filed with the Commission as Tariff Filings and, except those which require an application to be filed or unless suspended by the Executive Director, may become effective 10 days after appearing on the Commission's Daily Transportation Calendar.

The conditions of common carrier service and complete criteria to qualify for rates, including discounts, shall be

contained in each carrier's tariffs. Common carriers must bill for services at the lowest applicable discounted rate.

Rates shall be nondiscriminatory. No secret codes, undisclosed discounts, or write-in tariffs shall be permitted. All discounts shall be identified and crossreferenced in the carrier's tariffs.

The freight bills of carriers which publish discounts, must contain: (1) a statement that discounts may be applicable, and (2) the carrier's phone number and address to obtain further information.

Common Carrier Contract Rates

Contract carriers that also have common carrier authority may enter into contracts for common carrier service for a period of up to one year without Commission approval. Contracts may be effective 10 days after appearing on the Commission's y Transportation Calendar.

Common carrier contracts may only provide service at rates which are initially equivalent to the common carrier's tariff rates, but may lock in rates over the term of the contract or provide for upward adjustments tied to specified escalation factors.

All common carrier contracts must be filed with the Commission and are public documents.

Special Contract Rates

Special contracts are only for service or under conditions which: (1) are not normally provided under common carrier tariff rates by any carrier, and/or (2) provide for a special relationship between the carrier and the shipper. Dedicated equipment is not required.

All permitted contract carriers can enter into special contracts, whether they hold common carrier certificates or not. There are no restrictions on contract rates.

Special contracts require Commission staff review to insure that a special relationship exists between the carrier and the shipper and/or service is not normally available under com-

mon carrier tariff rates. The definition of special relationship requires a continuing relationship of at least 30 days and a meaningful shipper obligation, which can be met by a minimum level of service or other special conditions.

Unless suspended by the Executive Director, special contracts may become effective 20 days after appearing on the Commission's Daily Transportation Calendar.

All special contracts must be filed with the Commission and are public documents.

Suspension of Rates

The Executive Director may suspend common carrier tariffs, common carrier contracts or special contracts one time for an additional 30 days, after which they will become effective unless further suspended or denied by Commission order.

Service

Every common carrier will be required to provide a minimum service level of one pickup or delivery per week for all points which are served under that carrier's filed tariffs, if service is requested by any shipper.

Common carriers which serve at the minimum service level are encouraged to also offer enhanced service, such as service on demand, to small and rural communities.

Commission staff will conduct surveys of service and reasonableness of rates for small and rural communities and other traffic lanes as necessary, and publish the results.

Safety

Commission staff will monitor carrier driver education and training programs.

Safety related programs and data will be coordinated with other governmental agencies.

Commission staff will establish a toll free telephone number for verifying a carrier's operating authority.

> Carrier entry requirements established in connection with AB 3490 will be extended, where appropriate, to existing carriers in a future proceeding.

Under this regulatory program, common carriers must hold themselves out to serve the general public by filing tariffs in accordance with PU §§ 486, 487, 488, and 493(a). All common carrier tariffs should describe accurately and fully the services offered to the public and provide the specific rate or the basis for calculating charges for the performance of those services, and show all related classifications, rules and practices. Tariffs should also be filed and maintained in a way that allows all users to determine the exact charges for any given shipment. All discounts shall be identified along with the qualifying criteria. We will enforce the PU Code prohibitions against common carrier tariffs which are shipper specific.

Common carriers that also hold contract carrier authority may enter into both special contracts, on the same terms as any contract carrier, and common carrier contracts. Common carrier contracts shall initially be at or equivalent to common carrier rates, but may thereafter lock in rates, be linked to specific escalation factors, and use alternate classification or rating systems. Common carrier contract rates need not track tariff rates during the contract term. However, any classification or rating system must be designed to initially produce the common carrier's tariff rates and shall require the carrier to be liable for loss and damage to the same extent it is liable under common carrier tariffs.

Contract carriers as such are not required to hold themselves out to serve the general public, but may enter into special contracts. Special contracts are for service or under conditions which: (1) are not normally provided under common carrier tariffs by any carrier, and/or (2) provide for a special relationship between the carrier and shipper. Special contracts may be effective on 20 days' notice unless suspended.

Contract carriers that also hold common carrier authority may enter into either common carrier contracts at their filed common carrier rates or special contracts. Contract carriers may acquire

common carrier authority once all common carrier requirements are satisfied.

The Executive Director may suspend a special contract prior to its effective date if it does not comport with the mandated criteria, or if further investigation is necessary, e.g. to study an unusual shipper obligation. The suspension procedures are similar for all types of carriage—common carrier tariffs, common carrier contracts and special contracts. Suspensions of either tariffs or contracts shall be for not more than 30 days and may be initiated either on the Executive Director's own motion or after protest as set forth in G.O. 147-B, attached as Appendix D to this decision. After the suspension period, the contract or tariff will become effective unless further suspended or denied by Commission order.

In D.89575, we specified the proper scope of Highway Contract Carrier operations. That decision states that "a contract carrier must generally have a continuing relationship with the shipper or shippers it serves" and that "a continuing relationship cannot be predicated upon a single shipment." The decision went on to state that "a continuing relationship requires that service be provided periodically over a period of time not less than 30 days in duration."

We do not intend to depart from the definition of common and contract carriage contained in D.89575, but we will further define the proper scope of contract carriage and specify the transportation characteristics and shipper responsibilities that identify a special contract.

Most simply put, special contracts will be authorized where: (1) the transportation services are not provided by any carrier under common carrier rates; or (2) there exists a continuing relationship between carrier and shipper, and the contracts provide for meaningful shipper obligations beyond the obligation to pay for services provided. Details are set forth in the *Special Contract Regulations* section.

Some commenters to the Proposed Decision restated arguments that all contracts be confidential, on the grounds that disclosure of contract terms unfairly releases proprietary informa-

tion to the shipper's competitors. Contracts are not now confidential. Because ready access to information encourages competition and discourages discrimination we will not allow confidentiality. Contracts are public documents.

Subhaulers continue to be classified as contract and common carriers and afforded the same regulatory treatment as prime carriers. This is discussed in more detail in the Subhaulers section of this decision.

As is true for the present program, under the adopted program there will be no barriers to entry in terms of limiting operating authorities, commodities or areas of service. Carriers will be allowed to individually set rates without additional Commission approval. However, common carrier rate increases greater than 10% or cumulatively greater than 10% for the last 12 months, common carrier rates at less than a minimum level of variable costs and rates collectively set under PU § 496 will require formal applications.

To provide for an orderly conversion to our adopted regulatory program, we will grandfather under G.O. 147-B all rates and contracts which are governed by G.O. 147-A and in effect immediately prior to the effective date of G.O. 147-B. This will allow general freight contracts to remain in effect until their expiration date, which cannot exceed one year. However, within 90 days from the effective date of G.O. 147-B, all common carrier tariffs, except shipper specific tariffs and rates which include write-in tariffs, must conform to G.O. 147-B requirements. Shipper specific tariffs and rates which include write-in tariffs must conform to G.O. 147-B according to a 120 day phase-out schedule.

As previously discussed all parties agree with our primary goal of providing the public with safe, reliable service at reasonable, nondiscriminatory rates. Below we show how each of these criteria meshes with our adopted program.

Safety, Service and Price Discrimination

The adopted program meets policy goals in these areas, as discussed previously. The program does not conflict with the

Commission's safety goals, as discussed in the *Safety and Entry Requirements* section. Flexibility in setting rates will not compromise safety as long as direct enforcement activities are given full support.

We agree with the Rigid Rate Proponents that the trucking industry is unique in that it provides a service to the public over public roads. From this we conclude that common carriers should provide the public with a minimum level of service. To ensure adequate and reliable service to small and rural communities, we will require common carriers to serve, at least once per week, each point for which they have filed tariff rates. Service may be provided directly by the carrier or through arrangements with other carriers. Service need not be provided if none has been requested.

Additionally, we instruct the Commission staff to conduct studies of service to small and rural communities, and studies of rates in traffic lanes statewide. These surveys should be published and where problems exist recommendations made for corrective action.

Even though nondiscriminatory rates are a legal requirement for any common carrier rate program, price discrimination can exist with or without economic regulation. An economically regulated market can lead to opportunities for discriminatory pricing (witness current write-in tariffs that result in secret discounts to shippers) just as easily as one that is unrestrained. To minimize the potential for rate discrimination in our adopted program, as well as to encourage open competition, the following safeguards will be enforced:

1. All requirements for discounts must be contained in the carrier's filed tariffs.

2. Common carrier service can only be provided at common carrier filed tariff rates.

3. Common carriers must bill for services at the lowest discounted tariff rate applicable.

4. All common carrier contracts and special contracts must be filed with the Commission and available for public inspection.

5. All tariff and contract filings will be noticed in the Commission's Daily Transportation Calendar.

Limits to Zone of Reasonableness

We have found that in a workably competitive market, rate flexibility within a zone of reasonableness provides reasonable common carrier rates.

The upper limit to the zone of reasonableness is a cap on rate increases set at 10% over the lowest rates in effect at any time within the previous 12 months. The DRA introduced testimony supporting a cap of 5% per quarter (up to 20% per year). We believe this figure is too high. After considering recorded changes in the costs included in the TFCI and likely fluctuations under normal market conditions, we find that a 10% ceiling on increases over a 12-month period should provide sufficient flexibility for the zone of reasonableness. The 10% ceiling allows a common carrier to increase any rate as often as it chooses within a 12-month period as long as the total of all increases for that rate does not exceed 10%. A common carrier will also be able to decrease any rate as often as it likes, but any decreased rate cannot subsequently be increased by more than 10% within a 12-month period. We warn carriers that efforts to avoid the 10% cap on rate increases, for example by making cosmetic changes to tariff conditions then claiming that an increased rate is for different service, shall be monitored closely. We will reject tariff filings which attempt to subvert the intentions of the zone of reasonableness.

The TFCI was designed as a system to track cost changes for motor carriers of truckload and less-than-truckload general freight. The index, which is substantially as proposed by CMA and CTA in Application (A.) 83-11-049, was adopted in D.86-04-045 and went into effect July 1, 1987. Costs are aggregated into seven categories each with a surrogate to measure actual cost changes. With the exception of the labor and insurance categories various United States Department of Labor, Bureau of Labor

Statistics producer price indexes (producer price indexes) are used as surrogates for all categories. The surrogate for labor is developed from the Commission's Highway Carriers Prevailing Wage Report (Prevailing Wage Report), and the surrogate for insurance is based on the California Automobile Assigned Risk Plan.

A review of Prevailing Wage Reports from 1980 and recorded changes in producer price indexes from 1961 indicates that yearly increases of 10% are not uncommon. Additionally, Exhibit 4 in A.83-11-049 (sponsored by CTA and adopted by CMA) calculated an 11.4% increase in the TFCI for 1981, had it existed at the time. While annual inflationary changes are usually less than 10%, we conclude from the recorded inflationary data and Exhibit 4 in A.83-11-049 that an annual ceiling of 10% provides sufficient pricing freedom for carriers to reflect normal inflationary variations.

Having shown that the 10% limit is sufficiently flexible, we also note that it helps to keep rates from becoming unreasonable and it provides incidental protection against possible market failures. Any upper limit to rates serves to protect against monopoly pricing and predatory pricing. Because entry into the market is relatively unrestricted, workable market competition by itself prevents monopoly pricing and unreasonably high rates. Competition also protects against predatory pricing; ease of entry allows many other carriers to quickly undercut rates imposed during the second step of a predatory pricing attempt. The upper limit provides added protection for common carriers and their customers. The 10% limit also provides incidental protection against predatory pricing, because in a predatory pricing attempt a price increase must follow a decrease designed to drive competitors out of the market, and that decrease itself lowers the base price to which the 10% is applied. This extra protection is not necessary for contract carriers because competition by itself adequately protects the public against the claimed dangers of predatory pricing.

Although today's stable economy and competition itself are sufficient protections against destructive pricing below cost, the lower bound to the zone of reasonableness adds incidental protec-

tions. There is no simple rule stating at what point pricing below full long run costs becomes destructive. A lower limit set at full costs would be overly protective, to the point of being economically inefficient. A full cost limit would work to support inefficient carriers; the benefits of competition would be lost and prices would rise.

In our judgment a lower limit of a minimum level of variable cost is consistent with prior cases which define the lower limit of the zone of reasonableness as "out-of-pocket" costs. That limit will also provide incidental protections against destructive pricing practices by common carriers. We realize that distinctions between fixed and variable costs depend on the time frame of the carrier. Economically, the very definition of the long term is when all costs become variable, which is an elegant way of saying that even long run fixed costs have to be paid sometime. For practical purposes a carrier's fixed costs are those assignable to capital investment and overheads. Variable costs are most closely related to day-to-day expenses such as driver labor, fuel, tires and maintenance. Thus a lower limit of a minimum level of variable costs will keep a carrier's revenues high enough to pay required wages, fuel and tire costs, maintenance, and insurance.

The chosen definition of minimum level of variable costs should also include as much of a carrier's safety expenses as is practical, not in support of any economic theory but to remove any implication that safety expenses are not emphasized. Actually the floor price will not serve as any incentive to alter carrier expense beyond achieving greater efficiency. Because the floor price is not used to index rates and in fact will likely be far below most rates, there is no detrimental incentive to reduce wages, safety expenses or any other individual cost item. However, in response to possible public concerns, we will include insurance and maintenance as variable costs. We exercise little control over carriers' accounting conventions for safety-related training, maintenance and inspection costs. It is likely that these are found in accounting categories for both maintenance and overheads. However, we will not insist on including overheads within the adopted definition of variable costs solely to capture an uncertain fraction dedicated to safety.

Because the lower end of the zone of reasonableness includes only a minimum level of variable costs and does not include any capital costs, we believe that few if any rates will be as low as the floor price. This removes any incentive for carriers to index their own rates to the floor and creates an incentive for carriers to set cost-based rates.

Variable Cost Calculation

We have determined that the minimum level of variable costs should include driver labor, fuel, tires, maintenance and insurance. It will not include capital costs and overhead.

We will order further hearings on the final form of the variable cost calculation and a procedure for updating the floor price. The scope of those hearings should cover alternate proposals for calculation of a minimum level of variable costs and comment on the interim calculation described below. The hearings will not revisit the decision to use variable costs as the basis for the floor price. Until those further hearings are completed we adopt the following interim floor prices, so that the new regulatory program can be implemented promptly.

We choose to make the floor prices uniform for all common carriers, distinguished only between truckload and less-than-truckload carriage. Although there are theoretical virtues to allowing individual carriers to use their own variable costs in the calculations, these benefits are outweighed by problems with allowing floor prices to vary among carriers. Individually set variable costs could cause problems for owner-operators and subhaulers, and could raise claims of discrimination from carriers with high labor rates.

For driver labor we will include only the legal minimum labor costs, including minimum wage and required wage adders. As an interim measure we will set other costs based on carrier annual report data previously used to determine the TFCI, which has been adopted by the Commission. In further hearings we will set floor prices for the remainder of 1990. Thereafter we will adopt new values annually, according to procedures to be determined in further hearings. Use of annual report data to set interim floor prices is more reasonable than delaying the entire program.

With every tariff filing that changes rates, a common carrier must file a completed "FLOOR PRICE CERTIFICATION" form, which is attached to G.O. 147-B.

The formula used to develop the form is based on minimum wage labor costs adjusted upward to cover legally required wage adders, plus an aggregate figure which includes industry-wide average costs for fuel, tires, maintenance and insurance. The interim formula is:

Floor Price ($/mile)

= (minimum wage, $/hour)

x (1 adjustment factor for wage adders)

/ (average speed, miles/hour)

(fuel, tire, maintenance and insurance costs; $/mile).

The data used to calculate the interim floor prices is derived as follows:

The current minimum wage is $4.25 per hour. The factor used to increase the minimum wage to account for wage adders includes Social Security (FICA), Federal Unemployment Insurance (FUI), State Unemployment Insurance (SUI) and workers compensation. The FICA rate for 1990 is 7.65% up to $50,400 annual gross, which exceeds driver income at the minimum wage. FUI and SUI costs depend on annual income. The FUI rate is 0.8% of the first $7000. This must be adjusted for annual wages. The prevailing wage data for 1989 show that statewide line haul drivers of five or more axles average 1977.6 working hours per year, which at $4.25 per hour would generate $8404.80 annually. Thus the average FUI rate is 0.67%. The SUI rate varies, but staff cost engineers have consistently used 4.2%. It can be argued that for regularly employed drivers FUI and SUI are not variable costs at all, but we retain them for now to avoid any appearance of giving carriers incentives to avoid unemployment payments. Workers compensation rates vary quarterly and by industry; the rate for the first quarter of 1989 was 16.95% and we shall use it. Thus the total rate for the four legally required wage adders is 29.47%.

Although it would be simplest to use the same floor price for all common carriers, we recognize that TL and LTL carriers operate very differently. LTL carriers generally show slower average speeds due to their many stops and added terminal time. For purposes of calculating interim floor prices we will use 48 miles per hour for TL carriers, a figure that has been used in dump truck deviation proceedings. For LTL carriers we will use 30 miles per hour as an average speed.

Data for other costs are taken from the same data set used to calculate the TFCI, modified to exclude those carriers that did not report vehicle miles in their annual reports. Average costs are shown in Table 3 below:

TABLE 3

CALCULATION OF OTHER COSTS

Cost Element	Industry Average, in $/mile	
	Truckload	Less-Than-Truckload
Fuel	0.177	0.185
Tires	0.033	0.034
Maintenance	0.154	0.161
Insurance	0.102	0.092
Total	0.466	0.472

The difference between truckload (TL) and less-then-truckload (LTL) is barely 1% of the total. Although this difference is small, we will retain the distinction in calculation of TL and LTL floor prices.

Inserting the above values into the formula, the adopted interim floor prices are $0.581 per mile for TL carriers and $0.655 per mile for LTL carriers. These prices apply to all common carriers, including owner-operators and carriers using subhaulers.

If a carrier believes it can justify a rate below the floor price, it may demonstrate the reasonableness of rates below the standard floor price by formal application to the Commission. This type of application should be no more burdensome than the current process of cost justification, which further convinces us to begin the adopted program now rather than wait until completion of

further hearings on the topic. When expressed in terms of dollars per mile, many existing LTL rates for small shipments would be below the floor price. However, we recognize that small LTL shipments are most often aggregated into larger loads, and the floor price applies only to the total load, not each small shipment. Thus for small shipments the floor price should be compared to rates which are prorated up to typical aggregated load size. Pending the outcome of the further hearings on floor prices, we will adopt 12,000 lb. as a typical LTL aggregated load. The proper LTL floor price comparison is shown by this example: A tariff rate for a certain commodity is $0.35 per mile for a 2000 lb. shipment. A 12,000 lb. load of that commodity would generate revenues of $2.10 per mile (12,000 / 2000 x $0.35), which is above the floor price of $0.655 per mile. LTL shipments above 12,000 lb. need not be prorated downward to 12,000 lb.

The current prevailing wage program for general freight was established in 1980. The Commission explained its purpose as follows:

> "[T]he primary use to which prevailing wage rates will be put will be in justifying rate increase and rate decrease filings, on the part of carriers, and in evaluating rate filings, subject to complaints or to petitions for investigation and suspension." (D.91265, 3 Cal. P.U.C. 2d 176, 179 (1980).)

At that time, as now, justifying rate changes required cost justifications which included labor costs of at least the prevailing wage. Under the adopted program for general freight, cost justifications will not normally be required. Any necessary cost justifications (e.g. in a formal application to exceed the upper end of the zone of reasonableness) should rely on actual carrier costs, not prevailing wages. Therefore, the prevailing wage program as it relates to general freight is unnecessary.

The use of the TFCI was ordered in D.86-07-019 and D.86-12-102, which required that carriers use the TFCI in setting general freight rates. Because the indexing of those rates will now cease, and because the floor price calculation will be determined in further hearings in this proceeding, there is no need to continue use of the TFCI program.

However, because it is possible that elements of the prevailing wage and TFCI programs could be retained in calculation of the common carrier floor price, we will defer rescinding the programs until after the further hearings on floor price calculation.

Incentives for Common Carriage

We have determined that the two important controls for dividing incentives between common and contract carriage are the effective dates of each type of filing and the applicability of contract carriage.

To promote an effective common carriage system in California, we will allow tariff filings to become effective more quickly than special contracts. In his Proposed Decision the assigned ALJ recommended that tariffs be effective on the date filed. We agree with the ALJ that the needs of commerce require that rates become effective in less than the 30 days stated in § 491. Carriers must have the ability to respond to changes in costs and to meet competition. However, we will make tariffs effective 10 days after notice appears in the Daily Transportation Calendar. In this way the staff will have an opportunity to briefly analyze the filings and seek with the Executive Director suspensions before the effective dates, where appropriate. The requirements for suspension of an effective tariff are substantially more rigorous than during the 10-day protest period, and we must maintain protections against a proliferation of filed tariffs that are incorrect in format or content. The rejection rate for tariff filings under the current program is high enough that suspension of proposed tariffs must not be made unduly difficult.

We will maintain the incentive for common over contract carriage by ordering a 20-day effective date for special contracts. The ALJ recommended 30 days, but we believe that 20 days, which is 10 days more than for common carrier tariffs, more reasonably balances the incentives for the two types of service.

The effectiveness of a competitive common carriage market would be degraded by unnecessary rate and tariff complexity. For this reason we adopt discounting and billing rules that will encourage carriers to keep tariffs simple and understandable to shippers. Carriers should not be able to use arcane discounting

rules to hide available discounts from shippers. Tariffs should be open and understandable, not so complicated that actual billed rates are determined by shipper savvy instead of the competitive forces that drive rates toward costs. Carriers have the burden to offer and bill service at the lowest applicable discounted rates. In any dispute over availability of discounts, shippers will not have the burden to find the best rate.

A number of parties in their comments suggest that common carriers be allowed to reduce rates on an experimental basis. Experimental rates would provide carriers the opportunity to return rates to their prior level within a 90-day window. Parties argue that rates are often reduced in expectation of traffic levels which may not materialize. Without the ability to return rates to their prior level carriers either will not risk making substantial rate reductions or will be required to operate at a loss.

Although we do not believe experimental rates are necessary to safeguard carriers, we will provide carriers with some flexibility in this area. An unrestrained experimental rate process could lead to a plethora of experimental rates and jeopardize the integrity of the adopted zone of reasonableness. However, we will relax the 10% upward limitation to allow that any change to a common carriage tariff may be withdrawn or amended within 30 days of its effective date without affecting the 10% ceiling.

Common carrier rate increase applications are now typically processed on an ex parte basis, with a decision issued within 60 days from the filing date. Common carriers can continue to use this procedure to request rate increases greater than 10%. Rate increase applications should contain a request for ex parte treatment, provide justification for the rate increase, and demonstrate that their actions are not predatory or otherwise noncompetitive. This procedure, along with the 30-day withdrawal option, affords common carriers the opportunity to expeditiously return reduced rates to their prior level without compromising the zone of reasonableness.

To promote administrative efficiency we will allow common carriers to cancel at their option any tariff rates that have not moved traffic within one year or more, without being subject to

the 10% limitation at the upper end of the zone of reasonableness. This allows cleanup of inactive rates while avoiding technical problems of implied rate increases, e.g. as theoretical shipments under inactive tariff rates might become subject to higher class rates, if there were any such shipments.

Common Carrier Contract Regulations

As explained elsewhere in this decision and in the general orders, common carrier contracts will be available to carriers with dual authority. This flexibility will allow shippers and carriers with continuing relationships to make mutually beneficial agreements without the added obligations needed for special contracts. In exchange for the increased flexibility the parties agree to charge only rates based on tariff rates.

However, we are concerned about possible abuses of common carrier contracts. Without necessary restrictions, they could be written to allow rates substantially below tariff rates, for example by immediate reductions of rates driven by a declining index. This could in turn lead to unreasonable price discrimination without the discrimination protections inherent in common carrier tariffs. In order to avoid such discrimination we will order that common carrier contracts may not be amended or the rates therein adjusted below the rates in effect at the time the contract is filed. Thus common carrier contract rates cannot fall below the tariff rates on which the contract is based. Common carrier contracts can be amended or extended as long as this restriction is met. Common carrier contracts do not require a floor price comparison, as the tariff rates themselves have already passed that test. Nor are common carrier contracts subject to the 10% increase limitation at the upper end of the zone of reasonableness, because there is no obligation to serve under such contracts.

Common carrier contracts are also subject to guidelines 3, 4 and 5 for special contracts shown below.

Special Contract Regulations

Special contracts will be approved where no common carrier normally provides service or where a special relationship exists. A special relationship is one that is continuing and includes meaningful shipper obligations. Those obligations can be met by a specific minimum level of service or by other terms. The following guidelines apply:

1. A continuing relationship requires that service be provided over a period of not less than 30 days and include more than a single shipment. A continuing relationship cannot be predicated upon a single shipment.

2. The meaningful shipper obligation can be met by either of the following conditions:

A. A minimum of $1000 per month of delivered transportation services, or

B. Other obligations not described above but which call for a substantial shipper obligation of a type not found in common carrier tariffs. Examples are plant security arrangements; unusual scheduling agreements; guaranteed demand; services covering more than intrastate operations, such as interstate or exempt carriage; and so forth. We warn carriers that staff investigation of these unusual obligations may trigger 30-day contract suspensions by the Executive Director. Meeting the $1000 minimum will be easier to determine within the 20-day effective date period.

3. In a special contract a shipper can be either the consignee or consignor. Normally the shipper is regarded as the party who pays the charges for the transportation provided. However, the shipper may also be the party who controls the traffic, for example a manufacturer who ships freight collect to dealers of his product.

4. Carriers must keep copies of contracts at their offices for the terms of the contracts and for not less than three years after expiration.

5. Contracts shall be filed with the Commission and shall be public documents.

The guidelines to qualify special contracts insist on meaningful shipper obligations. Such obligations are necessary to distinguish contract carriage from common carriage. Otherwise contract carriers could selectively and unfairly compete against common carriers, who are held to higher standards of rates and service.

This still allows much flexibility, but not to the point that the contracts become substitutes for common carriage. Common carriers hold themselves out to serve the public. With that obligation come higher standards of protection against price discrimination, a protection not required of contract carriers. We intend to keep that distinction in mind in any future enforcement actions against contract carriers who actually will serve any shipper without a special relationship. We will set no artificial limits on numbers of contracts that can be held by a single contract carrier; that flexibility encourages us to enforce carefully the special relationship requirement.

We choose the service minimums that substantiate the special relationship with the intent to allow flexibility. For most contracts we expect that the shipper's obligation will be most easily met by the minimum service measure of $1000 per month. This limit is low enough to allow small carriers to participate while being large enough to guarantee more than a single shipment on most routes. Other obligations can be used to meet the test when they are supported in the carrier's filing.

It is not our intent that the $1000 per month minimum create any "take-or-pay" obligations for shippers. However, failure by a shipper to take that amount of services will mean that the carrier no longer meets the requirements for special contract approval. As well, we will not insist that service be provided in every month, provided that the average level of service to date is greater than $1000 per month or the other meaningful obligations are continued. If the average is maintained through every month we will

allow up to two consecutive months of service below the minimum before the contract would be out of compliance.

Our enforcement efforts for contracts that fall out of compliance will be directed at terminating, not suspending, the contracts. For contract carriers that also have common carrier authority, service can be continued only under applicable common carrier tariffs or upon filing of a new contract. For carriers without common carrier authority, service can be continued only by filing a new contract. Because the carrier will no longer have authority to deliver services under the old contract, the carrier will be in violation of the General Orders and subject to regular enforcement actions.

Under the current regulatory program contracts are limited to a one year term. We will retain that one year limit, but will allow annual extensions of contract terms by contract amendment as allowed by the General Orders, which requires approval of both shipper and carrier. This provision applies to common carrier contracts as well.

Monitoring

We have discussed at length our preference for a regulatory program which provides carriers with rate flexibility. Although our adopted program includes a number of safeguards to ensure carrier rates are reasonable, we believe a monitoring program should also be established. A monitoring program will provide us the opportunity to identify and correct any market failures in a timely fashion.

DRA and CPIL are the only parties that address a monitoring program. Both recommend certain monitoring activities be adopted. CPIL suggests the following program to arm the Commission with information and expertise, but that we should intervene only when necessary to resolve a market flaw:

1. Continuous monitoring of the degree of competition within relevant product and geographic markets.

2. Sophisticated studies of cost factors for efficient carriers by type, size and volume.

3. Surveillance of rates charged, and evaluation of substantial deviations from prior rates.

4. Strict scrutiny of rates in sectors lacking competition.

5. Comparison of rates with cost-based rates.

6. Active investigation of rate levels for predation.

DRA also proposes an ongoing evaluation of market and industry conditions. Their proposal requires the Transportation Division to prepare and submit reports on the following:

1. Number and type of rate filings.

2. Direction and degree of rate movements.

3. Operating authority data and trends.

4. Cost and operational changes.

5. Truck-at-fault accident data.

6. Number, nature and disposition of complaints and protests.

DRA and CPIL have recommended a number of monitoring activities that are interesting in understanding the trucking industry, but do not directly influence our primary goal—safe, reliable service at reasonable, nondiscriminatory rates. The monitoring activities that we consider important to safeguard our goal are discussed below.

First, we will continuously monitor the degree of competition and quality of service within small and rural communities and other traffic lanes as necessary. Obviously, this activity is designed to spot potential market failures in the most vulnerable locations. The number and type of public complaints filed with the Commission should be used as a guide in determining which communities and traffic lanes to target. The current complaint procedures can provide valuable information in many areas such as poor or inadequate service, and discriminatory rate or service practices. Complaint data should give a strong indication where further investigation is needed.

Second, the reasonableness of rates in traffic lanes and communities statewide should be reviewed and recommendations made when corrective action is warranted.

Third, truck-at-fault accidents and other related safety data will be monitored to provide vital information concerning safety in the trucking industry.

The responsibility for this monitoring program will be assigned to the Commission staff.

We will not hesitate to modify or rescind this decision if changed circumstances cause rates to become unreasonable and compromise the responsibility of the Commission to ensure just and reasonable rates.

Environmental Considerations

There is no doubt that California's intrastate trucking industry has a significant impact on the environment. We are mindful of our duty to consider environmental issues, as required by Public Resources Code Sections 21000 and 21001, and in this decision we have considered the environmental impacts alleged by CTA.

Several CTA witnesses testified that truck emissions and traffic congestion caused by trucks are significant problems, and we agree. However, CTA claims that allowing unrestricted entry into the intrastate general freight market will have a significant impact on those problems. We cannot agree with that claim.

For our policy of unrestricted entry[3] to increase these environmental problems, it would have to cause an increase in the miles actually traveled by trucks on California's highways, or at least an increase in truck traffic on the more congested highways or at more congested times of day.

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[3] By "unrestricted entry" we mean that there is no Commission-set limits to the number of operating authorities that can be granted, the commodities that may be hauled, or the areas that may be served. We continue to require that all new entrants meet statutory requirements, including the new entry requirements discussed in the *Safety Legislation* section

However, we have allowed unrestricted entry into the general freight business for a number of years. The adopted program does not change this policy. There are already thousands of carriers with statewide authority to transport general freight, and restrictions on entry only limit the number of trucking companies, not the number of trucks each company can operate. Thus, even if new authorities were to become totally unavailable, there would be no effective regulatory limitation on the ability of existing firms to expand to meet market demands. We have no reason to believe that restricting entry would limit the number of miles traveled by trucks, or that continuing our policy of open entry will cause an increase in trucking mileage. Similarly, we see no relation between the number of firms with authority to operate and whether they choose to operate on the more congested highways or at more congested times of day. We see no reason to believe that continuing our present policy of unrestricted entry will cause an increase in pollution or traffic congestion.

However, we do have reason to believe that by allowing increased price competition our adopted program may actually have a beneficial effect on pollution and congestion problems. As we said in *Re: MRT's 6-B and 13*, 3 Cal. P.U.C. 2d 752, 785 (1980):

> We expect increased price competition to produce increased operational as well as financial efficiency. Equipment utilization should be maximized, thereby reducing empty miles, excessive use of the highways, and unnecessary fuel consumption.

Legal Authority for Adopted Program

Contract Carriers

In *United States Steel Corp. v. Public Utilities Commission*, 29 Cal. 3d 603, 608 (1981), the California Supreme Court reiterated that PU § 3662, governing contract carriers, "vest[s] in the commission discretion to set minimum rates, maximum rates, or no rates at all." (Citing *CTA v. PUC*, 19 Cal. 3d at 246-48.) U.S. Steel further states:

> that refusal to impose minimum rates [is] permissible when the record fail[s] to demonstrate 'an obvious or persuasive need in the public interest' or that 'the rates would not have a meaningful effect on the transportation involved.' In addition, . . . exemption from rates [can] be justified when 'the exemption would not lead to destructive rate practices.'

Our adopted regulatory program for contract carriers does not include either maximum or minimum rates. From a public policy perspective, the need for minimum rates can be reviewed by looking at the claimed dangers of: (1) monopoly pricing, (2) monopsony pricing, or shipper clout, (3) predatory pricing, (4) destructive pricing, (5) price discrimination, and (6) inadequate service. Clearly, in a workably competitive market no protections against monopoly pricing are necessary. The same factors protect against shipper clout and predatory pricing, as discussed in the *Shipper Pricing* and *Predatory Pricing* sections. As discussed in the *Destructive Competition* section, the severe economic conditions behind historical episodes of destructive pricing are extremely unlikely. This prospect and workable competition combine to adequately protect the public against the very unlikely danger of destructive rate practices. No protections against price discrimination for contract carriers are necessary. Contracts are the result of negotiations between willing parties, and price discrimination is of no concern. Incidental protections against price discrimination are provided by the adopted program because the contracts are public documents. Such ready access to information encourages competition and this discourages price discrimination. Inadequate service by individual contract carriers is irrelevant because they have no obligation to serve. Minimum rates are not necessary to ensure adequate service by contract carriers as a class, because of the unlikelihood of destructive pricing. Moreover, common carriers have an obligation to serve and are available statewide. In sum, minimum rate protections are not necessary. A rate exemption for contract carriers of general freight is justified because it will not lead to destructive rate practices.

Commission-set maximum rates are likewise not necessary for the contract carriage of general freight. Competition will restrain

unreasonably high prices due to monopoly pricing. If a carrier's rates are too high, other competitors will take the business. Indeed, our current regulatory program for contract carriers of general freight already reflects this reality, as it likewise does not set any maximum rates. Neither would maximum rates provide any needed protections against predatory pricing or price discrimination, for the reasons discussed above in connection with minimum rates. Maximum rates would provide no protections against shipper clout or destructive pricing in any circumstances, and again inadequate service by individual carriers is not relevant to contract carriage. In short, the record fails to demonstrate "an obvious or persuasive need in the public interest" for the setting of maximum rates.

Contrary to any claims that minimum or maximum rates are necessary, the record demonstrates that the public interest will be served by freeing carriers of general freight from unnecessary maximum and minimum rate requirements and instead allowing them to respond efficiently to market conditions. If carriers must respond to unnecessary regulatory requirements, rather than market demand for their services, they will operate inefficiently with the attendant risks of oversupply, waste of resources, and stifling of innovation.

In sum, we conclude that under the present circumstances we are justified in exercising the discretion we have under PU § 3662 to set neither maximum nor minimum rates for the contract carriage of general freight. This rate system is in the public interest and will not lead to market failures or to destructive rate practices.

Common Carriers

While contract carriers are subject to PU § 3662, common carriers, with their obligation to serve the public in a nondiscriminatory fashion, are subject to a somewhat different statutory and common law scheme. PU § 451 requires common carriers to charge just and reasonable rates. As this Commission has previously stated:

> There is a zone of reasonableness within which common carriers, so long as statutory restrictions are not transgressed,

> may and should exercise discretion in establishing their rates. The upper limits of that zone are represented by the level at which the rates would be above the value of the service, or be excessive. The lower limits are fixed, generally, by the point at which the rates would fail to contribute revenue above the outof-pocket [variable] cost of performing the service, would cast an undue burden on other traffic, or would be harmful to the public interest. Rates at the upper limits of the zone may be termed maximum reasonable rates; those at the lower limits of the zone may be termed minimum reasonable rates.
>
> (*Investigation of Reduced Rates for Transportation of Bulk Cement*, 50 Cal. P.U.C. 622, 632-33 (1951).)

Our adopted program for common carriers includes a variable cost floor, which will ensure that their rates remain within this zone of reasonableness. Numerous cases establish that common carrier rates based on variable, or out-of-pocket, costs fall within the zone of reasonableness, and that a carrier-set rate is not unreasonable just because it does not recover fully allocated costs. Thus, in *Southern Pacific Co. v. Railroad* Commission, 13 Cal. 2d 89, 114-16 (1939), the California Supreme Court held that certain proposed common carrier rates were not unreasonably low where they would return to the carrier its "out-of-pocket cost of transportation." In *California Portland Cement Co. v. Southern Pacific Co.*, 42 C.R.C. 92, 104, 106, 116 (1939) this Commission approved rates at a level not far above "out-of-pocket costs" (equated with "direct costs"), even though those costs excluded items such as taxes and return on investment. In the *Bulk Cement* case quoted above, this Commission approved reduced rates based on out-of-pocket cost calculations, that separately figured the variable portion of maintenance expenses in order to determine the out-of-pocket costs. (50 Cal. P.U.C. at 628.) And in In D.58664, *Investigation of Reduced Rates* (June 23, 1959) (headnoted at 57 Cal. P.U.C. 229) (reprinted at 62 Cal. P.U. C. 259, 260-61) the Commission similarly approved rates based on "outof-pocket costs" (defined as those costs which vary with changes in the traffic handled) even though those costs excluded depreciation, overhead expense, other fixed charges, certain taxes, and return on investment.

Moreover, rate decreases within this zone should not "cast an undue burden on other traffic." Competition will prevent a common carrier from decreasing some of its rates and then trying to charge other traffic unreasonably high rates to make up for the decrease. If the carrier tries to charge this other traffic unreasonably high rates, competitors will take away the business. Furthermore, as explained above, freeing highway carriers from unnecessary rate regulation will not harm the public interest, but rather serves the public interest by allowing carriers to respond efficiently to market conditions and thus avoid problems of inefficiency, oversupply, waste of resources, and the stifling of innovation. Accordingly, we conclude that the less than maximum reasonable common carrier rates authorized by this decision are required by the needs of commerce and the public interest. We also find that the less than maximum reasonable common carrier rates authorized by this decision are justified by transportation conditions because: (1) of the workably competitive market for general freight transportation, (2) the unlikelihood of destructive rate practices under present economic conditions, and (3) our requirement that common carrier rates not fall below our variable cost floor. (*Cf.* PU § 452.)

Our adopted program for common carriers relies on both competition and the 10% limit to keep rates from rising to excessively high levels. If a common carrier tries to raise its rates to an excessive level, competitors will take the business away by offering more reasonable rates. In addition, our adopted program prohibits a common carrier from increasing a rate by more than 10% within any 12-month period, unless it files a formal application. The formal application process will ensure that the reasonableness of larger rate increases will be subject to more detailed scrutiny.

In short, we conclude that our adopted regulatory program for common carriers of general freight will keep their rates within the zone of reasonableness.

Looking at the policy concerns we have discussed previously, we see that competition protects against the dangers of monopoly pricing and shipper pricing in common carriage in the same way it protects contract carriers. Competition also adequately protects

common carriers against predatory pricing, and the upper end of the zone of reasonableness adds to that protection. The variable-cost floor also provides incidental protection against destructive rate practices. This protection is over and above the principal protections against destructive pricing, which are the low risk of severe economic conditions and competition.

PU § 454 provides that no common carrier shall increase any rate or so alter any classification, contract, practice, or rule as to result in an increased rate, except upon a showing before the commission and a finding by the commission that the new rate is justified.[4] As outlined above, this proceeding hasshown that common carrier rates under our adopted regulatory program fall within the zone of reasonableness. Accordingly, we find that the new and increased common carrier rates approved by this decision are justified.

Protections against price discrimination are more important for common carriers than for contract carriers, see, e.g., PU §§ 453, 461.5, and the adopted program provides the necessary protections. Those protections include: a prohibition of shipper-specific tariffs; a prohibition of secret rates and discounts, including write-in tariffs; and public notice of all tariff filings and a protest procedure. Protections against inadequate service are provided in the form of a minimum level of service, as well as incentives for cost-based rates.

Our adopted rate flexibility program allows common carrier rates to become effective 10 days after the carrier's filing appears on the Commission's Daily Transportation Calendar. As pointed

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[4] PU § 454 states that "[*e*]*xcept as provided in section . . . 455* no [common carrier] shall change any rate or so alter any classification [etc.] as to result in a new rate except upon a showing before the commission and a finding by the commission" (emphasis added). However, § 455 permits rate schedules, classifications, contracts, practices, and rules not increasing or resulting in an increase in any rate to go into effect without any such showing or finding. Thus, § 454 only requires such a showing and finding where there is a rate increase. Constitution, Article XII, § 4, contains a substantially identical requirement.

out above, under PU §§ 455 and 491, for good cause the Commission can allow rate changes on less than 30 days' notice by an order which: (1) specifies the changes to be made, (2) identifies when the changes will occur, and (3) sets forth the manner in which changes shall be filed and published. Here, as explained in the section *Incentives for Common Carriage*, there is good cause for allowing these changes to become effective on less than 30 days' notice in order to allow common carriers to respond to market conditions as rapidly as possible, while still ensuring compliance with our regulatory requirements. As we have said before, all other things being equal, a system which permits carriers of general freight to respond to the demands and constraints of a competitive market is a better system. Our order meets the further requirements of § 491; G.O. 147-B (attached as Appendix D) identifies when rate changes can occur, specifies the changes that can be made, and sets forth the manner in which rate changes shall be filed and published.

The preceding discussion concerning common carrier rates and notice periods generally applies also to common carrier contracts. Although common carrier contracts can only be offered by common carriers that also possess contract carrier authority, common carrier contract rates are based on common carrier rates and are subject to a 10-day notice period.

Subhauling

Although a number of parties commented on this issue the three most active parties were Lou Filipovich (Filipovich), Teamsters, and Fischer. Filipovich and Teamsters for different reasons recommend subhauler rate regulation through a division of revenues between the prime carrier and the subhauler. Fischer recommends a leasing program similar to the ICC's be established. Other recommendations run the gamut from no change in the current program to cost-justified subhauler rate schedules. The positions of the parties are discussed below.

Filipovich

Filipovich, an independent operator, is authorized to operate as a highway common carrier in California and has over 40 years' experience in transportation. Filipovich cites an extensive histori-

cal background of proceedings in which subhauling has been addressed without resolution and urges the Commission to act in this decision.

Filipovich believes the very nature of subhaulers as small businessmen with limited resources has caused them to be a traditionally underrepresented class. The parties with financial resources to participate in regulatory proceedings usually have no incentive to address subhauling. This results in an unregulated subhauling system in a regulated transportation industry. The solution Filipovich presents would require carriers that engage subhaulers to pay all revenue billed the shipper, consignee or party paying the freight bill, to the subhauler who performed the services.

Teamsters

Teamsters argues that while there has always been a true entrepreneurial class of subhaulers, in the era of deregulation there has been a tremendous increase in the use of owner-operators working exclusively for one carrier. For the most part, these owner-operators provide nothing more than a low cost alternative to employee drivers. By using owner-operators, prime carriers can avoid such expenses as maintenance, insurance, fuel and Social Security taxes. They need not be concerned with investing in new equipment, purchasing fuel, maintaining costly safety programs, or covering owner-operators under workers compensation, unemployment, or disability insurance systems. Nor are they required to withhold income taxes from the compensation owner-operators receive.

Teamsters references DRA's subhauler study, Exhibit 14, produced for the March, 1988 en banc hearing on trucking regulation as the only empirical study of the financial condition of general freight subhaulers. This study paints a vivid picture of the evolution of a one-time small and viable class of entrepreneurs with a particular market niche into a large group of exploited drivers running permanently unprofitable operations.

The study found two distinct classes of subhaulers. Approximately 71% of subhaulers earned all revenues from subhauling and 50% of these worked exclusively for one prime carrier, while

the remaining 29% engaged in subhauling to supplement their earnings as prime carriers. The study also compared prime carrier costs to those of subhaulers and found the latter to be much lower; likewise, the study found subhaulers earn much lower revenues:

> "Certain variable costs (fuel, tires, maintenance) of operating a truck make up the 'running cost'. These costs are roughly comparable for overlying carriers and subhaulers. Total costs, in contrast, are significantly different. . . When subhauler costs are adjusted to include compensation for driving labor, they are still 30-40% lower than the average overlying carrier cost. This difference is large enough to suggest that other significant costs are understated. Average revenues for subhaulers are 37% less than average overlying carriers revenues. The size of this difference suggests that subhaulers' revenues may be less than their fully allocated (long-run marginal) costs." (Ex. 14, p. iii.)

Teamsters concludes from this that subhaulers must pay themselves less than the industry average for employee drivers, and at the very least are an inexpensive substitute for labor. Teamsters' witnesses testified that this lower wage level may be at or even below minimum wage, given the number of hours owner-operators must stay on the road to remain financially viable. Clearly, this has an impact on the labor market. Between 1978 and 1986 the percentage of total general freight hauled by subhaulers increased from 20% to 30%. Finally, Teamsters claims subhaulers have very limited bargaining power; rates are dictated to them on a take-it-or-leave-it basis.

Teamsters is convinced that subhaulers compete with employee drivers for work because prime carriers are able to shift their operating costs to subhaulers. Given that workers compensation insurance averages approximately 17% of payroll, employers' contribution to Social Security tax 7.5%, and unemployment insurance another several percentage points of gross income, the immediate incentive to use subhaulers is apparent. The incentive is so great that some carriers reach beyond what is lawful to designate employee drivers as independent contractors. Thus,

subhaulers function to depress the wages and working conditions of employee drivers.

Teamsters believes that subhaulers should compete against other carriers, not against employees and the Commission should regulate them as it does other carriers. Its rules should mandate that the relationship be consistent with that of two independent businesspersons. Therefore, Teamsters suggests the following changes in the current regulatory program:

1. Require all carriers earning more than $50,000 in revenue to file annual reports.

2. Require all carriers seeking operating authority to demonstrate they have sufficient operating capital and cash flow to enable them to remain in business for at least 90 days.

3. Establish a cost-justified subhauler rate schedule which reflects a prevailing wage component, maintenance, fuel, taxes, insurance costs and overheads peculiar to subhauler operations.

4. Increase the bonding limit in G.O. 102-H to an amount proportional to the number of subhaulers a carrier employs, and increase the bonding claim period from 60 days to 6 months.

CMA

CMA advocates treating subhaulers like any other contract carrier. To the extent that a prime carrier is not willing to enter into a true, fully contractual relationship with a subhauler, the prime carrier/subhauler relationship should be equivalent to a shipper/carrier relationship, or the subhauler should become an employee of the prime. This procedure would offer subhaulers a more stable and enforceable relationship with prime carriers. Subhaulers could also publish their own tariffs and operate as common carriers. CMA believes this proposal would widen the sales options and generally improve conditions for subhaulers.

Fischer

Fischer states there is insufficient evidence on which to base any conclusions that would impose a Commission-set formula for

sharing the revenue between a prime carrier and a subhauler. Fischer identifies two types of subhaulers. The first is a true subhauler; one who deals with a number of prime carriers and the public in an effort to build up business. Ultimately, that subhauler will reduce its subhauling activities and increase its direct service to the public.

Fischer characterizes the second type of subhauler as an owner-operator. The owner-operator contracts long term with a prime carrier, does not move from carrier to carrier, has no contact with the public and is controlled by the prime carrier. Operating authority is held by the owner-operator only because it is required by the Commission. Fischer contrasts this with the ICC where no authority is required for the owner-operator to enter into a long-term equipment lease with the prime carrier.

Fischer argues that the evidence in this proceeding shows owner-operators do not wish to be employees, nor do prime carriers wish them to be employees. However, consistency is needed between the interstate treatment and the intrastate treatment of the owner-operator/prime carrier relationship. Therefore, Fischer recommends:

1. The existing subhauler class of carrier be maintained, but redefined as an operation where the subhauler contracts with the prime carrier on a shipment-by-shipment basis and cannot enter into consecutive contracts with the same prime carrier for more than 30 days.

2. The leasing regulations found in G.O. 130 be amended to provide that a carrier can lease equipment from a noncarrier owner-operator with driver for not less than 30 days and the lessee takes the exclusive possession and control of the vehicle.

Mike Conrotto Trucking (Conrotto)

Conrotto engages subhaulers exclusively and finds the current regulatory program burdensome and discriminatory for carriers that engage subhaulers. Cost justification procedures are difficult because subhauler cost data is almost impossible to collect; many subhaulers are small operators with inadequate records. This hinders Conrotto's ability to obtain reduced rates and results in lost traffic. Conrotto believes the current regulatory program should be abandoned.

Southern California Motor Delivery, Inc. (SCMD)

SCMD testified that the current regulatory program will not sustain a healthy motor freight infrastructure and lists the following specific problems with respect to subhaulers:

1. Inadequate compensation.
2. No guaranteed payment provisions.
3. Inability to establish rates.
4. Difficulty in obtaining workers compensation insurance.

SCMD predicts dire consequences for the industry unless the subhauler is recognized as a distinct class of carrier. To improve the situation, SCMD suggests the Commission require written agreements which provide subhaulers with: (1) an enforceable payment procedure, (2) a Commission established compensatory rate level, and (3) a wage higher than the prevailing wage level. SCMD also recommends a Commission-mandated policy for workers compensation coverage.

CTA

CTA recommends establishment of cost-justified subhauler rate schedules which use prevailing wage data and require the prime carrier to pay according to the subhauler's rate schedule.

DRA, Coalition and Dedicated Contract Carriage, Inc.

These parties see subhaulers as stabilizing factors in the general freight sector and argue that the existing program provides adequate protection for the subhauler. Subhaulers balance operations, allowing prime carriers to adjust to the ebb and flow of

demand without committing scarce capital to equipment that may sit idle during periods of low demand.

Additionally, Dedicated Contract Carriage, Inc. believes the current regulatory program works in the best interests of both carriers and the public. The public has access to safe, reliable service at reasonable rates. Subhaulers are protected against prime carrier abuses without the burden of economic regulation.

Discussion

The regulation of subhaulers (also known as owner-operators, independent contractors or underlying carriers) has been the subject of considerable controversy since the enactment of the Highway Carriers Act in 1935. At the center of this controversy has been the lack of certainty with respect to the operating authority required for performing subhauling services or the status of the carrier engaging a subhauler. A major part of the difficulty is that all types of subhauling are lumped together for regulatory purposes, even though there is a great diversity in practice.

G.O. 102 defines a subhauler as:

> "... any authorized carrier who renders service for a prime carrier (principal or overlying carrier), for a specified recompense, for a specific result, under the control of the prime carrier as to the result of the work only and not as to the means by which such result is accomplished. This term includes subsubhaulers in appropriate cases."

D.91247 requires a California intrastate subhauler of general freight to hold operating authority issued by this Commission.

> "Subhaulers are subject to regulation under Division 2, Chapter I, of the Public Utilities Code." (D.91247.)

No distinction is made between subhaulers and prime carriers in securing or maintaining operating authority; both have the same regulatory requirements. Also, G.O. 130 requires a bona fide employer-employee relationship between the lessee and the driver or drivers of any leased motor vehicle when leasing between carriers.

No requirements equivalent to D.91247 or G.O. 130 exist for interstate commerce. Interstate carriers do not need operating authority to be engaged by another carrier, and can lease a motor vehicle and driver together without the driver having an employee-employer relationship with the lessee. However, the lessee (overlying/prime carrier) when operating in California must register, designate a process agent, and file evidence of insurance with this Commission.

The diversity of subhauling practices ranges from an occasional engagement to full-time subhauling. Typically, subhaulers work either on an irregular basis to supplement the prime carrier's fleet or permanently as a part of the prime's fleet.

Interestingly, little seems to have changed with respect to subhauling in over fifty years. The following excerpt from D.42647, dated March 22, 1949, is equally relevant today:

> "The record shows that there are many kinds of subhauling. Some operators are exclusively subhaulers; thousands of others perform subhauling occasionally or with parts of their fleets. Subhaulers may be owner-drivers, or may be large fleet owners. Subhauling may involve a complete transportation service, or may cover any portion of the service. All of the witnesses were in agreement that subhauling provides a method whereby available vehicles and drivers may be utilized to advantage where needed. It was shown that the practice was well established prior to enactment of the Highway Carriers' Act and the City Carriers' Act in 1935, and that it has not diminished in importance." (D.42647, 48 CPUC 577)

There is a growing concern that the use of subhaulers working exclusively for one carrier is merely a low cost alternative to employee drivers. Teamsters and other parties presented testimony that prime carriers exploit subhaulers to avoid or reduce prime carrier costs for maintenance, equipment, insurance, fuel, Social Security taxes and safety programs. Teamsters argues that the savings from the avoidance of workers compensation insurance, unemployment insurance and Social Security taxes exceed 30% of payroll costs.

This leads us to the following policy consideration. Should the Commission provide rate regulation for subhaulers to protect subhaulers from exploitation by prime carriers, and/or protect employee drivers from competition?

Filipovich is the primary party supporting protection from exploitation for subhaulers. He proposes protection through the regulation of subhauler payments. Teamsters recommends a form of rate regulation for subhaulers, but to protect employee drivers from competition. Also, Teamsters proposes additional protection for the public and subhaulers by increasing the bonding requirements for prime carriers that engage subhaulers. Specifically, Teamsters proposes that prime carriers should have to obtain a bond for each subhauler that is used rather than the current system which requires only one bond regardless of the number of subhaulers used. Under Section 5 of G.O. 102-H, subhaulers must be paid within 15 days. Therefore, each subhauler may be extending credit to the prime carrier for that amount of time. Teamsters believes a single $15,000 bond is inadequate for a prime that may employ many subhaulers. Teamsters recommends the bonding requirement be proportional to the number of carriers used but not necessarily on a one-for-one basis.

In considering subhauler regulation we should not forget the Commission's legislative mandate to protect the public by ensuring safe, reliable service at reasonable, nondiscriminatory rates. Regulation of subhaulers clearly furthers this goal, and is appropriate. With the exception of revenues from transportation performed, our current regulatory requirements for subhaulers are the same as for prime carriers.

Although we share Filipovich's and the Teamsters' concerns over the plight of subhaulers and employee drivers, there is insufficient evidence to warrant their protection in all subhaul arrangements. This is consistent with our conclusion in prior sections that we should only protect the trucking industry if it furthers our goal to protect the public.

However, in the public interest, we are convinced that formulas to divide revenues between prime carriers and subhaulers under various conditions should be established so that subhaulers are

assured adequate protection for the conduct of their operations in a reliable manner. The ALJ's proposed decision would have adopted a division of revenues which mirrored the system adopted by D.52388 and D.88440 for the dump truck industry. However, several parties commented that the general freight and dump truck industries have many dissimilarities. These parties recommend an independent investigation into this matter. We agree that further hearings are necessary to establish an appropriate division of revenues between subhaulers and prime carriers and will schedule additional hearings to address this issue. The further hearings will include consideration of exemptions or limitations for less-than-truckload carriage and other subhauler issues. With a division of revenues scheme in place we see no need for subhauler rate schedules as recommended by Teamsters.

We will also consider in the further hearings Fischer's recommendation that intrastate leasing requirements for equipment and drivers be aligned with the ICC requirements.

We will continue to classify subhaulers as either common carriers or contract carriers and require them to meet the same entry and filing requirements as prime carriers.

This record shows that about one-third of subhaulers work exclusively for one prime carrier. Teamsters charges that this practice is nothing more than the prime using the subhauler as a low-cost alternative to employee drivers. Other parties see the practice as a stabilizing factor in the general freight business, a balancing of operations that might otherwise require prime carriers to invest in equipment that would have a low usage and thus raise rates and, ultimately, consumer prices. We will not interfere in this quite natural economic relationship between entrepreneurs, even though one side, the prime carriers, may have an advantage. We recognize that we cannot cover every conceivable base. Even if we try, past experience shows there is no end to the ingenious devices the carrier industry can come up with to thwart tight regulation.

Concerning the prime carrier's responsibility for making sure that a subhauler driver is qualified, we note that §§ 1063.5 and 3553 already require prime carriers granted operating authority

after December 31, 1988 to "regularly check the driving records of all persons, whether employees *or subhaulers*, operating vehicles . . . requiring a class 1 driver's license." (Emphasis added)

On the issues of carrier demonstration of financial ability on application for a permit and decreasing the gross revenue level requirement for filing of annual reports, we find the present rules adequate. The present requirement that applicants for permits show 45 days of working capital and a 90-day profit and loss projection appears quite adequate, particularly if the applicant is a potential subhauler. This allows more persons to apply and thus furnish the industry with a larger pool of subhaul carriers. The present annual report cutoff of $500,000 gross operating revenue helps keep the Commission's paper work at a manageable level and yet provides us with the information and control needed to effectively monitor the industry.

A recommendation was made that subhaulers be considered contract carriers. We find this suggestion has no merit in view of our position on the need for subhauling as a stabilizing factor in the industry.

Finally, we see possible merit in reviewing subhauler bonding requirements for prime carriers and will direct the Commission's Transportation Division staff to issue a report within 180 days addressing the suggestions of the parties.

Collective Ratemaking

The U.S. Supreme Court ruled in *Southern Motor Carrier Conference*, 471 U.S. 48 (1985) (Southern Motor), that private action is immune from federal antitrust laws if it is pursuant to a clearly articulated state policy and is actively supervised by the state. PU § 496 establishes the legal basis for allowing antitrust immunity in California. The Commission may approve collectively set rates and rules if they are fair and reasonable and not contrary to public policy. Collective agreements must allow for independent action by individual members, and cannot be used for both rail and truck transportation, except when setting joint or through rates. The pooling or division of traffic is forbidden unless it is in the interest of the public or fuel economy and will not unduly restrain competition.

In accordance with G.O. 154, collectively set rates and rules may only be filed by rate bureaus which are non-profit organizations. The rate bureau must file a formal application including the bylaws of the organization, a membership list, an organization chart, and a verified statement indicating whether or not the membership currently includes both rail and highway carriers. Currently, eight rate bureaus have authority from the Commission to collectively file rates.

DRA

DRA recommends that collective ratemaking be retained for common carriers. DRA states that a consolidated effort reduces carrier costs for negotiating, calculating and setting rates, and preparing and filing tariffs. In a totally rate deregulated environment, DRA believes that collective ratemaking would be undesirable. Finally, although DRA comments that collective ratemaking may stifle or hinder competition, it notes that the legal requirement of independent carrier action within a bureau reduces this concern.

CTA

CTA proposes retaining the current program for approving collective rates. It also proposes requiring that all common carrier rates be filed through a rate bureau granted PU § 496 antitrust immunity. Carriers would retain the right to independent action. Within bureaus, proponents of rate changes must be either member carriers whose traffic is affected by the rate change or affected freight bill payers.

Coalition

The Coalition does not support collective ratemaking, and recommends bureau functions be limited to administrative areas and record keeping. If not restricted to these functions, Coalition would require rate bureaus to show that a collectively set rate is market driven and does not constitute an abuse of market power. The burden of proof in a complaint involving a rate bureau should be on the rate bureau.

CWTB

CWTB is a rate bureau approved by the Commission to perform collective ratemaking activities. CWTB is concerned that DRA's proposal to allow increased rate freedom will undercut its ability to make collective rates. Specifically, it is concerned that DRA's proposal will not provide the active supervision required in Southern Motor.

CMA

CMA supports the current rate bureau policy based on the assumption that they can perform valuable functions for small carriers which compensates for their non-competitive effect.

CLFP

CLFP believes collective ratemaking could lead to collusion. It suggests that the Commission end anti-trust immunity for rate bureaus. If collective ratemaking continues, rate bureaus should have the burden of proving that a collectively set rate is market driven.

WMTB

WMTB is an authorized rate bureau. WMTB believes that complete deregulation would render collective ratemaking useless. However, if the Commission retains regulatory control, it requests that any new regulatory program articulate an active supervisory role by the Commission over collective ratemaking.

NSSTC

NSSTC recommends that rate bureau increase applications be filed at least 30 days before the effective date of the rate. Rate increase applications would be accompanied by data justifying the increase. The Commission would retain the ability to approve, suspend or revoke an increase before it goes into effect.

Discussion

We agree with DRA that there are administrative efficiencies associated with rate bureaus. We also find that independent carrier action within rate bureaus minimizes the adverse impact that collective ratemaking can have on competition. Therefore,

we will retain the current collective ratemaking requirements including the requirement that all collectively set rates must be filed by formal application with appropriate justification.

Credit Rule

G.O. 155 governs the collection of charges by common and contract carriers subject to G.O. 147-A. The current rule allows carriers to extend credit for up to seven days, excluding Sundays and legal holidays, following presentation of the freight bill. This provision of G.O. 155 was intended to prevent the manipulation of rates, e.g., no interest loans and discriminatory practices, and simplify shippers' and carriers' accounting practices.

The Coalition and CMA recommend eliminating the credit rule as an unnecessary requirement. They argue that carriers can be more efficient if allowed to set their own rules. DRA proposes that carriers be given the latitude to extend credit for a "reasonable period of time", but does not define the term "reasonable".

NSSTC supports the current credit rule because thewide variety of credit terms and policies offered by ICC carriers has led to confusion. NSSTC prefers uniform credit rules over a multitude of carrier payment plans. Several other parties support the entire current regulatory program, but none identified the credit rule as a separate issue.

In the interest of uniform payment procedures and simplified rates, we will maintain the current credit rule in G.O. 155, but extend the time within which carriers are required to present the freight bill from 7 to 15 days. The additional time is provided to allow sufficient time for the freight bill to be processed and received. However, for special contracts we will provide contract carriers the flexibility to modify the credit terms in G.O. 155. Contracts which do not specify credit terms will be governed by G.O. 155-A. With adequate justification individual carriers can request deviations from the uniform credit rule. Revised G.O. 155-A is attached as Appendix E.

We will entertain further testimony on credit rule effects on subhaulers in our upcoming subhauler hearings, should any party wish to raise the issue.

Electronic Data Interchange

This issue was resolved on an experimental basis in D.89-04-049, dated April 12, 1989. We support the use of electronic data interchange as a means to improve efficiency in transportation markets. Our only concern in D.89-04-049 was that data necessary to verify the circumstances of a given shipment be retained in retrievable form. We will take no further action on the subject in this decision, except to suggest that the next convenient individual application for authority to use electronic data interchange be used to resolve generically the outstanding issues. The completeness of any upcoming applications and the availability of the Transportation Division report ordered in D.89-04-049 should determine which proceeding is appropriate. The staff report is due no later than February 11, 1990.

Implementation Issues

Transition from the current regulatory program to the adopted program has been discussed in several places throughout this decision; we will summarize our actions here. New filings for common carrier tariffs, common carrier contracts and special contracts can be made immediately on the effective date of the General Orders appended to this order. The revised General Orders will become effective March 15, 1990, to allow distribution to all carriers before their effective date.

All rates and contracts now in effect may continue in effect until their expiration. However, within 90 days of the effective date of the revised General Orders all common carrier tariffs must be revised, if necessary, to conform to new G.O. 147-B, except for shipper-specific tariffs and rates which include write-in tariffs.

The shipper-specific tariffs and rates which include write-in tariffs shall be phased out over a 120-day period. Every LTL carrier with 1988 California intrastate gross annual revenues (as reported in annual reports to the Commission) exceeding $10 million shall bring into conformance approximately one third of its problem rates and tariffs on a schedule of 30, 60 and 90 days from the effective date of the General Orders. Such rates and tariffs for all other carriers shall conform within 120 days. The Transportation Division shall within 15 days of the effective date

of this decision notify all common carriers of the exact filing dates and other necessary details.

The current maximum term for contracts is one year. Under the new program the one year limit is retained, but contracts may be extended for subsequent one year periods.

As discussed in the *Variable Cost Calculation* section, further hearings will be ordered on the common carrier floor price.

Staff may hold workshops throughout the state to introduce the new regulatory program, at its discretion.

Inherent in the adopted program is some delegation of authority to staff. The delegated authority is reduced from delegations in the current program. Specifically, staff is not being delegated any authority to make judgments concerning the reasonableness of rates. Staff will, however, maintain its duties to check rate and tariff filings for correct format and for the few rate and service limitations being imposed. Staff will not have direct authority to suspend any filing, but must present such requests to the Executive Director, who has the authority to suspend filings for one 30-day period. Within that period staff must prepare and support Resolutions for formal Commission action on further suspensions or rejections. The procedures for investigation and suspension of rates in effect remain unchanged; the standards for such suspensions have changed, however, to comply with the adopted program.

As specified in the General Orders, public protests to any filings must follow the Commission's Rules of Practice and Procedure. We retain this protest procedure to allow due process to aggrieved parties. At the same time we recognize that the legal resources of transportation industry parties may often limit or discourage such protests. We therefore encourage staff to continue to work cooperatively with parties who make oral or informal inquiries about rate and tariff filings that affect their interests.

Because cost justifications are not included in the adopted program, there is no need to retain Rule 7.7 in G.O. 147-A, relating to technical changes to tariffs that have a revenue impact of less than 1% of carrier annual revenues. That rule will be

eliminated. However, Article 7 of the Commission's Rules of Practice and Procedure (beginning with Rule 25) is not changed.

Finally, California Trucking Association's (CTA) brief addressed the admissibility of Exhibits 40 and 52. CTA argues that the ALJ erred in admitting these exhibits. While we stand behind the ALJ's ruling, it is important to note that this decision does not rely on the evidence contained in either exhibit.

We are convinced that, based on the record, our program is in the public interest, consistent with the provisions of the Constitution and the Public Utilities Code, and yields rates that are just and reasonable. G.O.'s 80-C, 147-B, and 155-A attached as Appendices C, D, and E, respectively, have been revised to reflect the adopted regulatory program discussed above. The following table outlines the ratemaking features of the adopted program.

TABLE 4

ADOPTED REGULATORY PROGRAM

Common Carrier Rates	Common Carrier Contracts(2)	Special Contracts
Increases(1)	All Contracts	All Contracts
File—Tariff filing with TD	File—Contract with TD	File—Contract with TD
Notice—Transportation Calendar	Notice—Transportation Calendar	Notice—Transportation Calendar
Protest Period—10 days	Protest Period—10 days	Protest Period—20 days
Approval—None if increase not more than 10% over past 12 months(3)	Approval—None (rate based on tariff(3)	Approval—None(3)
Effective—10 days after Calendar	Effective—10 days after Calendar	Effective—20 days after Calendar
Decreases		
File—Tariff filing with TD		
Notice—Transportation Calendar		
Protest Period—10 days		
Approval—None if rate above floor price(3)		
Effective—10 days after Calendar		

(1) New rates must be above floor price.
(2) Both common and contract authority required.
(3) Executive Director may suspend for 30 days for investigation or further Commission action.

Findings of Fact

1. On December 16, 1987 an order was issued which set en banc hearings to consider the State's regulation of the for-hire trucking industry.

2. En banc hearings for all sectors of the trucking industry were held in San Francisco on March 10 and 11, 1988 and in Los Angeles on March 18, 1988.

3. The Commission issued I.88-08-046 on August 24, 1988.

4. I.88-08-046 identified the Commission's regulatory objectives for the general freight trucking industry and invited a thorough re-examination of the current regulatory system.

5. Prehearing conferences which established the procedural rules for the proceeding were held on September 14, 1988 and October 17, 1988.

6. Fifty-four days of evidentiary hearings commenced on November 7, 1988 and concluded on February 24, 1989.

7. Two days of public comment hearings were held, one in Los Angeles on December 5, 1988 and the other in San Francisco on December 12, 1988.

8. D.86-04-045, dated April 16, 1986 adopted the present rate regulation program as represented in General Orders 80-B, 147-A, and 155.

9. G.O. 147-A implemented a system of carrier-made rates, a rate window, rate exempt dedicated equipment contracts, imposition of a Truck Freight Cost Index (TFCI), and a procedure for the cost justification of reduced rates.

10. Under G.O. 147-A common carrier general rate increases require a formal application to determine whether the carrier's financial condition justifies the request.

11. Common carrier rate increase applications typically are processed on an ex parte basis with decisions issued within 60 days from the filing dates.

12. Under G.O. 147-A rate decreases do not require formal applications. Instead carriers may file cost justification filings

which: (1) demonstrate that the rates will generate sufficient revenue to contribute to the carrier's profitability, (2) are accompanied by a summary of financial data, (3) include the prevailing wage standard in the labor cost element, and (4) meet specific provisions governing the use of subhaulers.

13. G.O. 147-A provides a rate window which allows carriers to change rates a maximum of 5% above or 5% below their base rate. Base rate changes require a cost justification filing for decreases or a formal application for common carrier increases.

14. Under G.O. 147-A carriers are allowed to make minor changes in contracts and tariffs without cost justification or formal application.

15. Under G.O. 147-A a carrier can temporarily reduce rates, effective immediately, to meet the rates of a competing carrier if it currently handles the traffic. The reduced rates must be followed by a cost justification within 60 days.

16. Under G.O. 147-A a carrier that does not currently handle the traffic cannot meet the rate of a competing carrier. To accomplish this change the carrier must file a cost justification and receive approval prior to reducing the rate.

17. Under G.O. 147-A common carriers cannot meet the rates of contract carriers without an approved cost justification filing.

18. Under G.O. 147-A the TFCI measures annual industry-wide changes in carrier operating costs and adjusts carrier base rates. Adjustments to base rates are mandatory if the change in the TFCI is greater than 1% (plus or minus) and permissive if less than 1%.

19. Under G.O. 147-A contract carrier rate increases do not require justification or approval, and new common carriers may file rates at existing generally applicable common carrier (GACC) rates without cost justification.

20. Under G.O. 147-A dedicated contracts offer contract carriers that dedicate equipment to one shipper the ability to charge any rate, subject to a profitability test.

21. Under G.O. 147-A to pass the above profitability test a carrier must: (1) have an expense ratio (expenses divided by revenues) of less than 100%, and (2) pay not less than the Commission's prevailing wage standard or demonstrate that its labor expenses compare favorably with the TFCI.

22. Under G.O. 147-A common carrier rate filings and contract filings with rates below GACC rates, except for dedicated contracts, new rate filings, and rate window filings, are listed in the Commission's Daily Transportation Calendar.

23. Under G.O. 147-A the waiting periods for carrier-set rates to become effective are:

On the date filed—Rate window filings, me-toos, standard contracts at or above GACC rates, and dedicated contracts.

Ten days after filing—Initial tariff filings by new carriers.

Thirty days after calendaring—All other filings, unless protested.

24. Shippers are frustrated over the current regulatory program's rigid requirements for the classification and rating of commodities, and over their inability to implement a simplified rating system and contract program.

25. The current regulatory program inhibits the implementation of simplified contracts and rating systems which would provide some shippers the opportunity to more efficiently manage and monitor their transportation costs.

26. The current regulatory program first places the burden on the carrier to cost-justify its rates, and then on the Transportation Division staff to analyze and evaluate the carrier's justification. This is a costly and inefficient procedure.

27. Cost justifications often take three to four months to process.

28. Cost justifications are often rejected if they are inconsistent with previously accepted filings.

29. The cost justification procedure is difficult to predict, subjective, results in fictitious traffic studies, can be manipulated, and uses prevailing wage data instead of actual labor costs.

30. Knowledgeable carriers are able to exploit the current rate program to gain competitive advantage.

31. Authorization of dedicated contracts as a tool to allow rate flexibility has limited usefulness.

32. Exclusive use limitations on carrier equipment can cause equipment to be used inefficiently.

33. Current use of the TFCI forces mandatory rate increases that would not otherwise occur, inserts time lags which hinder negotiation of contracts and discounts, incorporates averages and proxies in place of available actual data, and is administratively burdensome.

34. Write-in tariffs allow secret, shipper-specific rates.

35. Write-in tariffs prevent free access to information which would foster competition if it were available to other shippers and carriers.

36. Many common carriers do not have or understand write-in tariffs.

37. Common carriers without write-in tariffs are at a competitive disadvantage.

38. Write-in tariffs are not evaluated for cost justification or discrimination and can result in unjustified discriminatory prices.

39. Carriers must now already handle the traffic before they can match another carrier's rates without cost justification. This restriction stifles competition.

40. The large number of intrastate carriers in California makes cost justification of individual rate filings burdensome and ineffective.

41. The current general freight program is clumsy and inefficient, contains some major flaws that pose barriers to maintaining reasonable rates, and inhibits the State's economy from fully

benefiting from the services of a vital and vigorous for-hire trucking industry.

42. In a workably competitive market, if enough demand exists at prices which will compensate carriers for their costs, then carriers will serve that market.

43. Three conditions are sufficient to demonstrate that a market is workably competitive: (1) there are many buyers and sellers in the market, (2) entry and exit from the market are relatively easy, and (3) buyers and sellers have ready access to relevant information.

44. There are many buyers and sellers in the California intrastate general freight trucking market.

45. Carriers seeking authority from this Commission for the transportation of general freight by for-hire truck need only meet certain fitness and financial requirements and pay a $500 filing fee. Entry is not restricted based on the number or capacity of currently regulated carriers. Both the current program for general freight carriage and the program adopted by this decision provide for such open entry.

46. Entry into the intrastate general freight market and expansion into new areas are relatively easy.

47. The capital costs of entering the intrastate general freight market are relatively small, and capital risks are minimal.

48. Transportation equipment and terminals have multiple uses and can easily be sold or leased.

49. The costs of entry or expansion can be largely recovered upon exit from the general freight market.

50. Regular business relationships produce much relevant competitive information. Further access to information can be encouraged by regulatory program elements.

51. The intrastate general freight trucking market is workably competitive.

52. Antitrust laws help ensure that the general freight trucking market remains workably competitive.

53. Because the intrastate general freight trucking market is workably competitive, rate regulation is not necessary to keep rates from rising above reasonable levels. If one carrier tries to price its service too far above cost, other competing carriers will offer service at a lower and more reasonable rate.

54. Competition and rate flexibility provide sufficient protections against monopoly pricing.

55. Competition will restrain unreasonable shipper influence over pricing for the carriage of general freight; if a shipper is unwilling to pay reasonable prices for service, carriers can decline to serve. Carriers will not necessarily be forced out of business because there are many other shippers in the market.

56. Ultimately, to receive reliable service, shippers will be forced to pay prices which cover a carrier's costs.

57. The economies of scale in serving large shippers is a natural force of a competitive market, and market power will be checked and controlled by market forces.

58. Competition will prevent any rate decreases granted to certain traffic from casting an undue burden on other traffic.

59. Competition and rate flexibility provide sufficient protections against monopsony pricing, or shipper clout.

60. In a workably competitive market no further protections against monopoly pricing or unreasonable shipper clout are necessary.

61. Witnesses claimed that to be reasonable rates must protect against predatory pricing and destructive pricing below costs.

62. Predatory pricing is the lowering of prices to drive competitors out of business, and subsequent raising of prices to extract monopoly profits.

63. Because there are many carriers in the California intrastate market and entry is not difficult, it is not realistic to expect predatory pricing.

64. No convincing evidence was presented that predatory pricing will or could exist in the California intrastate market if

carriers have pricing flexibility within a workably competitive market.

65. The adopted regulatory program provides sufficient protections against predatory pricing by: (1) imposing no new restrictions to entry or exit, thus leaving entry and exist relatively easy, and (2) imposing rules that promote ready access to information, thus ensuring the market will remain workably competitive.

66. A maximum percentage limit on price increases within a given time period will provide additional protection against predatory pricing by common carriers.

67. This record contains no useful definition of the term "destructive competition", because that term implies that competition itself causes practices destructive to the industry as a whole.

68. During the Depression of the late 1920s and 1930s the destructive pricing practices observed were caused by the economic conditions of the times, not competition itself. The destructive practices contributed to low wages, inadequate maintenance and market instability, which were harmful to both shippers and carriers.

69. In light of current economic conditions we do not expect the destructive rate practices of sixty years ago to recur.

70. Pricing below full costs by individual carriers is not necessarily destructive to the industry as a whole.

71. Business failures by individual carriers are not necessarily destructive to the general freight carriage industry as a whole.

72. In other jurisdictions without economic regulation the general freight carriage industry has survived, and there have been no demonstrated pricing practices destructive to the industry as a whole. Rather, such markets have functioned efficiently.

73. There is no demonstrated need to adopt specific regulatory protections against destructive pricing practices, beyond incentives that rates be cost based.

74. The adopted variable cost floor price for common carriers will provide additional protection against destructive pricing.

75. Due to: (1) the very low likelihood that severe economic conditions like those during the Depression will be repeated in the near future, (2) the workings of competition allowed under a flexible rate program, and (3) the variable cost floor price applied to common carriers, our adopted regulatory program provides sufficient protections against destructive pricing practices.

76. An exemption from Commission regulation of general freight contract carrier rates is justified because it will not lead to destructive rate practices.

77. Price flexibility provides carriers the freedom to align prices more closely with costs and enables safe, well-managed and efficient carriers to earn a reasonable return on investment.

78. With price flexibility, carriers that price their services too far above cost will not survive because other carriers will be able to take business from them. Carriers that price their services too far below cost will not survive because they will fail to earn a reasonable return on their investment.

79. Carrier failures due to poor management and irrational pricing are a natural consequence in a competitive market.

80. Efficient carriers that price according to their costs and provide safe, reliable service will not only survive, but prosper when allowed price flexibility and an equal opportunity to compete.

81. Consumers and the economy generally will benefit from the substitution of market-set rates for government efforts to fix prices.

82. Our current regulatory program for contract carriers of general freight does not set any maximum rates.

83. Commission-set maximum rates are not necessary for the contract carriage of general freight because competition will restrain unreasonably high prices.

84. If carriers must respond to unnecessary regulatory requirements rather than market demand for their services, they will operate inefficiently with the attendant risks of oversupply, waste of resources, and stifling of innovation.

85. Freeing carriers of general freight from unnecessary rate regulation, including maximum and minimum rate requirements, will not harm the public interest; rather it will serve the public interest by allowing carriers to respond efficiently to market conditions and avoid the risks of inefficient operations.

86. The record fails to demonstrate an obvious or persuasive need in the public interest for the setting of any maximum rates.

87. We are justified in exercising the discretion we have under Public Utilities Code § 3662 to set neither maximum nor minimum rates for the contract carriage of general freight. This rate system is in the public interest and will not lead to destructive rate practices.

88. It is reasonable to limit common carrier rate flexibility to a zone of reasonableness.

89. If a zone of reasonableness adequately protects shippers and carriers against unreasonably high or low common carrier rates then all nondiscriminatory rates within the zone are reasonable.

90. To be useful to carriers a regulatory program must permit raising or lowering of prices to respond to market conditions.

91. Recorded data indicate that annual increases of 10% would not be uncommon for the TFCI and producer price indexes.

92. A 10% upper limit on common carrier rate increases within any one year period reasonably balances the flexibility required to change rates in response to cost and market changes, and additional protections against monopoly and predatory pricing.

93. It is reasonable to adopt a ceiling which limits common carrier increases in any rate to no more than a total of 10% within any one year period.

94. Under our adopted regulatory program for common carriers, competition and the 10% limit will keep rates from rising to excessively high levels.

95. Rates above our adopted 10% upper limit may be reasonable if it can be shown by formal application that the rates will not cause monopoly pricing, predatory pricing or price discrimination.

96. Floor prices based on variable costs are reasonable for the lower end of a zone of reasonableness.

97. Our adopted program for common carriers includes a variable cost floor price to ensure that rates do not drop below reasonable levels.

98. A variable cost floor price for common carriers assures that they are compensated for legally required driver wages; required unemployment insurance, workers compensation and Social Security taxes; and fuel, insurance, tire and maintenance costs.

99. Use of the data set used to calculate the TFCI is reasonable for purposes of setting floor prices until a further record can be developed.

100. A variable cost floor price does not compromise highway safety.

101. Competition will prevent rate decreases permitted by our adopted regulatory program from casting an undue burden on other traffic.

102. The less than maximum reasonable common carrier rates permitted by this decision are required by the needs of commerce and the public interest.

103. The less than maximum reasonable common carrier rates authorized by this decision are justified by transportation conditions.

104. Common carrier rates below our adopted price floor may be reasonable if it can be shown by formal application that the rates will not cause predatory pricing, will not cause destructive pricing and will not be discriminatory.

105. Our 10% upper limit for common carrier tariff rate increases, along with our lower variable cost limit, interacts with incentives for carriers to set cost-based rates to create just and reasonable rates in a workably competitive market.

106. Because the market is workably competitive, case-by-case cost justification is unnecessary.

107. Our adopted regulatory program for common carriers of general freight will keep their rates within the zone of reasonableness. Rates outside the adopted zone may be authorized following a showing and finding of reasonableness by the Commission.

108. The new and increased common carrier rates approved by this decision are justified and are reasonable.

109. Due to the size and number of their shipments large shippers can often be served by carriers at lower cost than small shippers.

110. No party supports discriminatory pricing, which is rate differences not justified by differences in costs or other conditions.

111. If rates are confined to a zone of reasonableness, then individual cost justifications are not needed to prevent price discrimination by common carriers.

112. The adopted regulatory program provides necessary and sufficient protections against common carrier discriminatory pricing by: (1) prohibition of shipper-specific rates, (2) prohibition of secret rates and discounts, including write-in tariffs, (3) requiring common carriers to bill for services at the lowest discounted tariff rates applicable, (4) public notice of rate filings, (5) adoption of a protest procedure, and (6) rate flexibility to encourage workable competition.

113. To prevent possible price discrimination it is necessary that common carrier contract rates not fall below the tariff rates in effect at the time the contract is filed.

114. Although the workings of competition will provide some protection, regulatory protections against price discrimination by contract carriers are not necessary because contract carriers do not hold themselves out to serve the public.

115. The complaint and protest procedures adopted in this decision will also act to prevent unreasonable rate changes.

116. The adopted regulatory program provides just and reasonable rates, and is reasonable.

117. Service to small and rural communities is affected by the level of rates carriers can charge.

118. Service to small and rural communities is not dependent on the existence or nonexistence of economic regulation. Whether rates are compensatory at a given level of service determines carrier enthusiasm to serve a market segment.

119. The adopted minimum level of common carrier service of one pickup or delivery per week upon requestto any point covered by a tariff provides adequate service to market segments that might not be served otherwise. Such service may be provided directly by the carrier or through arrangements with other carriers.

120. Adoption of minimum levels of service for contract carriers is not necessary because contract carriers do not hold themselves out to serve the public.

121. The balance of incentives for common and contract carriage can be reasonably controlled by setting different effective dates for rates for the two types of carriage and by defining the applicability of contract carriage.

122. To prevent contract carriers from unfairly competing against common carriers it is necessary to require that contract shippers have special relationships with carriers, unless the service is not normally provided under common carrier tariffs.

123. The necessary and sufficient conditions to demonstrate a special relationship are a continuing relationship and a meaningful shipper obligation beyond the obligation to pay for services provided.

124. An agreement that extends at least 30 days and requires more than a single shipment sufficiently demonstrates a continuing relationship.

125. An obligation by a shipper to use at least $1000 per month of transportation services is a meaningful shipper obligation. Other substantial shipper obligations of a type not normally found in any common carrier tariffs may also meet this requirement.

126. It is reasonable to allow special contracts to continue in effect for up to two consecutive months without fulfilling the obligation to use $1000 per month of services, or without the

other substantial obligation relied upon to qualify the special relationship. However, the average level of services since the contract became effective must continue to meet or exceed the $1000 per month obligation.

127. Allowing common carrier rates to become effective more quickly than special contracts, along with the adopted special contract eligibility rules, reasonably balances the flexibility required to change rates in response to cost and market changes, and incentives to maintain an effective, viable common carriage system in California.

128. Ten days notice is a reasonable time for review and protest of common carrier tariffs and common carrier contracts.

129. Twenty days notice is a reasonable time for review and protest of special contracts.

130. There is good cause to allow common carrier rate changes to become effective on less than 30 days notice, to meet the needs of commerce. The 10 day effective date will allow carriers to respond promptly to market conditions, while still ensuring compliance with our regulatory requirements.

131. It is reasonable to adopt interim common carrier floor prices of $0.581 per mile for truckload carriers and $0.655 for less-than-truckload carriers, pending further hearings.

132. It is reasonable to allow common carriers that also have contract carrier authority to enter into common carrier contracts that provide service at rates initially equivalent to the common carrier's tariff rates, but may lock in rates over the term of the contract or provide for upward adjustments tied to specified escalation factors.

133. The adopted common carrier contract regulations provide flexibility of service terms which increase market efficiency.

134. Public filing of common carrier rates is required by law. Public filing of all contracts as well as common carrier rates encourages competition and discourages price discrimination, and is therefore reasonable.

135. Under the adopted program: (1) all common carrier tariffs should describe accurately and fully the services offered to the public, provide the specific rate or the basis for calculating charges for the performance of those services, and show all related classifications, rules, and practices; (2) tariffs should be filed and maintained in a way that allows all users to determine the exact charges for any given shipment, including all available discounts; (3) all discounts should be identified in the tariffs, along with the qualifying criteria; and (4) freight bills of carriers which publish discounts should contain information about the availability of discounts.

136. The adopted regulatory program allows for public protests of all proposed rates and tariffs, and for formal complaints about all rates and tariffs in effect.

137. There are already thousands of carriers with statewide authority to transport general freight, and existing carriers can expand their trucking fleets without additional Commission authority.

138. There is no reason to believe that restricting the number of new carriers granted authority to transport general freight would limit the mileage traveled by Commission-regulated trucks.

139. There is no reason to believe that continuing to allow unrestricted entry into general freight trucking will cause an increase in pollution or traffic congestion.

140. A monitoring program is required so the Commission can identify and correct any market failures of the adopted program in a timely fashion.

141. The three-point monitoring program described below is sufficient to protect against unforeseen market flaws and is therefore reasonable.

142. First, Commission staff should conduct surveys and monitor the degree of competition and quality of service within small and rural communities and other traffic lanes as necessary. Staff should report its findings to the Commission and make recommendations for corrective action where warranted.

143. Second, Commission staff should review the reasonableness of rates in traffic lanes and communities statewide. Staff should report its findings to the Commission and make recommendations for corrective action where warranted.

144. Third, Commission staff should monitor truck-at-fault accidents and other related safety data.

145. Under the adopted regulatory program the Executive Director is delegated the authority to suspend for cause any rate, tariff or contract filing prior to its effective date. The suspensions shall be for no more than 30 days beyond the public notice period. No further authority over rates or rules is delegated.

146. Under the adopted regulatory program ultimate authority for approval of all rates remains with the Commission.

147. The adopted regulatory program does not unreasonably delegate authority to the Transportation Division or the Executive Director.

148. Recently enacted State legislation has significantly strengthened safety regulation.

149. SB 2594 (Stats. 1988, Ch. 1509) put into effect commercial driver license requirements from the Federal Commercial Motor Vehicle Safety Act of 1986 (Title XII of PL 99-570).

150. AB 3490 (Stats. 1988, Ch. 1175) specified additional entry requirements for new intrastate regulated motor carriers.

151. AB 3489 (Stats. 1988, Ch. 916) and AB 2097 (Stats. 1989, Ch. 1216) formalized the CHP/Commission suspension process for unsafe carriers.

152. AB 2706 (Stats. 1988, Ch. 1586) and AB 2097 (Stats. 1989, Ch. 1216) established schedules for equipment safety inspections and CHP terminal inspections and mandated certain commercial driver's license-related requirements.

153. SB 2876 (Stats. 1988, Ch. 159) mandated additional CHP roadside safety inspections and a report on an incentive program for safe drivers.

154. CHP is responsible for enforcing the rules of the road, setting safety standards for commercial carrier operations and inspecting carrier operations.

155. The Commission has responsibilities to ensure that new carriers are financially fit and able to conduct safe operations, and to coordinate safety enforcement with other State agencies.

156. DMV is responsible for licensing standards and procedures.

157. The Department of Health Services is responsible for registering carriers of hazardous waste materials and enforcing special hazardous waste transportation rules.

158. Because rigid rate regulation causes significant costs and adverse impacts in a workably competitive market, its retention is justified only if substantial safety benefits can be gained.

159. Carriers will not necessarily spend additional revenues on safety because each carrier allocates operating revenues in its own best interest.

160. The current and proposed rigid rate programs will not necessarily result in higher safety expenditures than those of a workably competitive market.

161. The Rigid Rate Proponents have not demonstrated that rigid rate regulation directly improves highway safety.

162. Direct enforcement action is more effective than rigid rate regulation in enforcing safety laws and good safety practices.

163. Commission staff in coordination with other State agencies will enforce recently enacted safety legislation.

164. Commission staff should take an active role in safety by monitoring required carrier driver education and training programs.

165. The Commission will consider the extension of the safety and financial entry requirements established by AB 3490 to all general freight carriers, where appropriate, in a future proceeding.

166. Some carriers continue to operate after suspension or revocation of their operating authority.

167. Transportation Division records which identify carriers holding valid operating authority should be made readily available to the public by establishing a toll free telephone number for public use to verify a carrier's operating authority.

168. Over the past few years there has been a significant increase in owner-operators working exclusively for one carrier.

169. A Commission staff report shows that 71% of subhaulers earn all revenues from subhauling, 50% of those work exclusively for one carrier, and another 29% engage in subhauling to supplement their earnings as prime carriers.

170. Between 1978 and 1986 the percentage of total general freight hauled by subhaulers increased from 20% to 30%.

171. Because of the large saving a prime carrier can make in employee contributions, there is a strong incentive to use subhaulers.

172. The practice of subhauling is a stabilizing factor in the general freight transportation industry which tends to keep the cost of transportation down.

173. All types of subhauling are lumped together for regulatory purposes, even though there is a great diversity in practice. This has caused lack of certainty with respect to operating authorities required.

174. D.91247 requires a California intrastate subhauler of general freight to hold operating authority from the Commission.

175. The requirements for operating authority in California are the same for prime carriers and subhaulers.

176. G.O. 130 requires a bona fide employer-employee relationship between the lessee and driver of any leased vehicle when leasing between carriers.

177. Regulation of leasing arrangements is different for carriers regulated by this Commission and those regulated by the ICC.

178. There is a growing concern that the use of subhaulers working exclusively for one prime carrier is a low cost alternative to employee drivers.

179. Some prime carriers exploit subhaulers in order to cut costs of operation and employee benefits.

180. Prime carriers who use subhaulers save more then 30% in payroll costs by not having to pay workers compensation insurance, unemployment insurance, and Social Security taxes.

181. If a division of revenue scheme were in place for prime carriers and subhaulers, there would be no need for subhauler rate schedules.

182. A formula to equitably divide revenues between prime carriers and subhaulers is necessary to insure that subhaulers have adequate protection for the conduct of their operations.

183. The present record does not provide enough facts on which to base a formula for the division of revenues between prime carriers and subhaulers.

184. The Commission's current rules and regulations concerning general freight subhaul operations should be continued pending further order of the Commission.

185. Further hearings should be held to consider possible rules on the division of revenues between prime carriers and subhaulers.

186. Further hearings should be held to consider amending Commission rules and regulations on leasing between carriers to determine if the rules and regulations could be patterned more closely to those of the ICC.

187. Under the PU Code, prime carriers granted operating authority after December 31, 1988, are required to check the driving records of all subhauler drivers who require a class 1 driver license.

188. Present Commission rules concerning financial information required to grant a permit and the revenue level at which an annual report must be filed by carriers are adequate for regulation of general freight transportation.

189. Present subhaul bond requirements for prime carriers may not adequately protect subhaulers.

190. The Transportation Division staff should be ordered to study and report within 180 days from the effective date of this decision on possible changes in prime carrier subhaul bonding requirements.

191. G.O. 155 provides a uniform credit rule for carriers.

192. To provide the public with reasonable, uniform payment procedures and simplified rates, the current credit rules should be retained. However, common carriers should be provided up to 15 days to present freight bills to shippers, and contract carriers should be provided the flexibility to modify the credit rule terms in G.O. 155 for special contracts.

193. PU § 496 authorizes the Commission to approve collectively set rates and rules if they are fair and reasonable and not contrary to public policy.

194. Rate bureaus should continue to file formal applications containing appropriate justification for approval of collectively set rates under PU § 496.

195. Independent carrier action within rate bureaus minimizes the adverse impact that collective ratemaking can have on competition.

196. Retention of current collective ratemaking practice will allow rate bureaus to perform valuable functions for small carriers without jeopardizing workable competition in the market.

197. D.89-04-049 adopted the use of electronic data interchange on an experimental basis. The Commission will consider using the next convenient individual application to use electronic data interchange to resolve the outstanding issues generically.

198. All rates and contracts governed by G.O. 147-A which are in effect immediately prior to the effective date of G.O. 147-B should be grandfathered into the regulatory program adopted in G.O. 147-B.

199. Because no currently approved contracts extend beyond one year, it is reasonable that contracts now in effect be allowed to continue until their expiration.

200. With the exception of shipper-specific tariffs and rates which include write-in tariffs, all common carrier tariffs can and should be made to conform with G.O. 147-B within 90 days of the effective date of G.O. 147-B.

201. Due to the complexity of the situation involving shipper-specific tariffs and rates which include write-in tariffs it is reasonable to schedule compliance of these tariffs with G.O. 147-B over a 120 day period.

202. A reasonable compliance plan is for LTL carriers with intrastate gross revenues exceeding $10 million to bring into conformance approximately one third of such rates and tariffs within 30, 60 and 90 days from the effective date of G.O. 147-B. All other carriers should conform within 120 days from the effective date of G.O. 147-B.

203. G.O. 147-B, attached as Appendix D to this decision, identifies when rate changes can occur, specifies which changes can be made, and sets forth the manner in which rate changes can be filed and published.

204. Under the adopted program, there is no need to retain Rule 7.7 in G.O. 147-A.

205. It is reasonable to hold hearings to investigate alternative measures of variable cost and to determine an updating procedure for floor prices.

206. The prevailing wage program as it relates to general freight is unnecessary and there is no need to continue use of the TFCI program. However, it is reasonable to defer formal rescission of these programs until after further hearings on the floor price program.

207. This decision does not rely on evidence in Exhibits 40 and 52.

208. The regulatory program set forth in this decision fulfills our responsibilities and the regulatory objectives mandated by the Constitution and statutes, and should be adopted.

Conclusions of Law

1. Under Public Utilities Code § 3662 the Commission has discretion to set maximum or minimum rates or no rates at all for highway contract carriers.

2. The Commission may refuse to impose minimum rates when the record fails to demonstrate an obvious or persuasive need in the public interest. Exemption from Commission regulation of rates can be justified when the exemption would not lead to destructive rate practices.

3. Public Utilities Code § 726 implies the standard by which minimum rates are to be determined but does not require that such rates be set.

4. Common carriers have an obligation to serve the public in a non-discriminatory fashion.

5. Public Utilities Code § 451 requires common carriers to charge just and reasonable rates.

6. There is a zone of reasonableness within which common carriers may and should exercise discretion in establishing their rates.

7. Public Utilities Code § 454.2 allows the Commission to authorize a zone of rate freedom for common carrier passenger stage corporations where it finds that there is sufficient competition. Thus, the provisions of California Constitution, Article XII, § 4, requiring Commission authorization for common carrier rate increases, permit the Commission to authorize rate flexibility within a zone of reasonableness where there is sufficient competition. The language of Public Utilities Code § 454, requiring Commission authorization for certain rate changes, is substantially identical to the language of California Constitution, Article XII, § 4, insofar as they both require a showing and a Commission finding or decision that rates are justified. Thus, § 454, like the Constitutional provision, permits the Commission toauthorize rate flexibility for common carriers within a zone of reasonableness where there is a showing of sufficient competition.

8. The California Constitution and the Public Utilities Code permit the Commission to authorize rate flexibility for common carriers within a zone of reasonableness, based upon a finding that workable competition exists and that serious problems in areas of regulatory concern will not result.

9. Whether by flexible or rigid rate regulation, or in the case of contract carriers without rate regulation at all, the Commission must impose a regulatory program that meets statutory objectives, including just and reasonable rates and adequate, dependable, and safe service.

10. The Commission is not restricted to a cost-of-service form of rate regulation.

11. The Commission has ample authority to establish an appropriate and effective form of flexible rate regulation for highway carriers of general freight.

12. Common carrier rates based on variable, or "out-of-pocket", costs fall within the zone of reasonableness. Out-of-pocket costs exclude items such as depreciation, overhead, other fixed costs, and return on investment. A carrier-set rate is not unreasonable just because it does not recover fully allocated costs.

13. Under Public Utilities Code §§ 455 and 491, for good cause the Commission can allow rate changes on less than 30 days' notice by an order which: (1) specifies the changes to be made, (2) identifies when the changes will occur, and (3) sets forth the manner in which changes shall be filed and published. General Order 147-B meets these requirements.

14. Our adopted regulatory program complies with the relevant provisions of the Constitution and the Public Utilities Code.

ORDER

IT IS ORDERED that:

1. The regulatory program for the transportation of general freight by truck outlined in the body of this decision is adopted. General Orders (G.O.) 80-C, 147-B, and 155-A, which implement this program and are attached as Appendices C, D, and E to this decision, shall replace G.O.s 80-B, 147-A, and 155, respectively. The new general orders shall become effective on March 15, 1990.

2. All rates and contracts governed by G.O 147-A and in effect immediately prior to the effective date of G.O. 147-B shall be grandfathered into the regulatory program adopted in G.O. 147-B. General freight contracts in effect prior to March 15, 1990 may remain in effect until their expiration dates.

3. Within 90 days from March 15, 1990, all common carrier tariffs, except shipper-specific tariffs and rates which include write-in tariffs, shall conform to the regulatory program adopted herein. However, common carriers need not refile existing rates for the purpose of meeting the floor price criterion in G.O. 147-B. Those rates may continue in effect according to Ordering Paragraph 2 above.

4. Shipper-specific tariffs and rates which include write-in tariffs shall be phased out over a 120-day period. Every lessthan-truckload (LTL) carrier with 1988 California intrastate gross annual revenues (as reported in annual reports to the Commission) exceeding $10 million shall bring into conformance approximately one third of such rates and tariffs on a schedule of 30, 60 and 90 days from March 15, 1990. All other carriers shall bring such rates and tariffs into conformance within 120 days from March 15, 1990. The Transportation Division shall within 15 days of the effective date of this decision notify all common carriers of the exact filing dates and other necessary details.

5. Common carriers publishing discounts must bill for services at the lowest applicable discounted rate.

6. On request, common carriers shall serve at least one day per week each point for which they have filed tariff rates.

7. The Executive Director shall cause the Commission's staff to do the following:

Conduct surveys and monitor the degree of competition and quality of service within small and rural communities and other traffic lanes as necessary, and publicly report its findings. Where problems exist recommendations for corrective action should be made.

Review the reasonableness of rates in communities and traffic lanes statewide, and publicly report its findings. Where problems exist recommendations for corrective action should be made.

In cooperation with the California Highway Patrol, gather and monitor truck-at-fault accident data and other safety related data in the trucking industry.

Enforce recently enacted safety legislation.

Evaluate extending to all general freight carriers the safety and financial entry requirements established by AB 3490.

Monitor required carrier driver education and training programs.

Establish a toll free telephone number for public use, to verify a carrier's operating authority.

Issue a report within 180 days from the effective date of this decision addressing possible changes to subhauler bonding requirements for prime carriers.

8. Additional hearings will be scheduled to consider possible revisions to this decision's common carrier variable-cost floor price calculation and a procedure for updating the floor price. The scope of those hearings shall include comment on the interim floor price adopted in this decision and any alternate proposals for calculation of a minimum level of variable costs. Those hearings will not revisit either the determination to base the common carrier floor price on variable costs or the exclusion of special contracts from the floor price requirement.

9. Additional hearings will be scheduled to consider possible rules on the division of revenues between prime carriers and subhaulers.

10. Additional hearings will be scheduled to consider amending Commission rules and regulations on leasing between carriers to determine if the rules and regulations should be patterned more closely to those of the Interstate Commerce Commission.

11. The issue of extending the safety and financial entry requirements established by AB 3490 to all general freight carriers shall be addressed in a subsequent proceeding.

12. As soon after the effective date of this decision as is practical, but no later than March 15, 1990, the Executive Director shall serve all highway common carriers and highway contract carriers with a copy of this order.

This revised order is effective today.

Dated February 7, 1990, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I will file a written concurring opinion.

/s/ G. MITCHELL WILK
President

APPENDIX 1

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List of Appearances

Interested Parties: Messrs. Skaff & Anderson, by *Ellis Ross Anderson*, Attorney at Law, for Skaff & Anderson; *Louis Asborno*, for T&T Trucking, Inc.; *Folger Athearn, Jr.*, for Athearn Transportation Consultants; Messrs. Rea, Cross & Auchincloss, by *John R. Bagileo*, Attorney at Law, for National Motor Freight Traffic Association, Inc.; Messrs. Handler, Baker, Greene & Taylor, by *Daniel W. Baker*, Attorney at Law, for Ad Hoc Carriers Committee; *Richard L. Bredeman*, for B. R. Garcia Traffic Service; *Barry Broad*, Attorney at Law, and Gerald O'Hara, for California Teamsters Public Affairs Council; *Ronald C. Broberg*, for Highway Carriers Association and Willig Freight Lines; *Robert E. Burt*, for California Manufacturers Association; *Harold Culy*, for C-F & Associates, Inc.; *Scott J. Engers*, Attorney at Law, for Con-Way Western Express, Inc.; *Ron Ewan* and Arden Riess, for West Coast Freight Tariff Bureau, Inc.; *Larry Farrens*, for California Carriers Association; Robert Fellmeth and *James Wheaton*, Attorneys at Law, for Center for Public Interest Law; *Milton W. Flack*, Attorney at Law, for Cal-West Tariff Bureau; *James R. Foote*, for Associated Independent Owner Operators; *Roy G. Graham*, for Mike Conrotto Trucking; *R. S. Greitz*, for Pacific Motor Tariff Bureau; *Thomas B. Guthrie*, for Guthrie & Associates; *Edward J. Hegarty*, Attorney at Law, for Bekins Moving & Storage, NACAL, Inc., Tri-Valley Transportation & Storage, Inc., Western Moving & Storage, Inc., California Carriers Association, California Dump Truck Owners Association, Marino Trucking Company, Inc., and Cherokee Freight Lines; *Eldon M. Johnson*, for Pacific Motor Tariff Bureau; *Ira Klein*, for Panther Line, Inc.; *Rich Matteis*, for California Grain & Feed Association; *Keith E. Miller*, for Miller Traffic Service, Inc. and Cal-West Traffic Bureau, Inc.; *Norman Molaug*, for J. C. Penney Company; *Diane Moore*, for ConWay Western Express; *Milton W. Flack*, Attorney at Law, and M. J. Nicolaus, for Western Motor Tariff Bureau; *Frederick E. Dooley*, Attorney at Law, Ronald W. Phelon, and David M. Newman, for Federal Trade Commission; *Ann*

Pougiales, Attorney at Law, for Viking Freight System, Inc. and California Coalition for Trucking Deregulation; Messrs. Walsh, Donovan, Lindh & Keech, by *Michael S. Rubin*, Attorney at Law, for Leaseway Transportation Corporation; Messrs. Russell & Hancock, by *John C. Russell*, Attorney at Law, for Dedicated Contract Carriage, Inc.; *Richard W. Smith* and Daniel J. McCarthy, Attorneys at Law, and Paul Stephen Dempsey, for California Trucking Association; Armour, St. John, Wilcox, Goodin & Schlotz, by *James Squeri* and John L. Clark, Attorneys at Law, for California Coalition for Trucking Deregulation; Messrs. Silver, Rosen, Fischer & Stecher, by *Michael J. Stecher* and John P. Fischer, Attorneys at Law, for Silver, Rosen, Fischer & Stecher; *William H. Sterling*, for California League of Food Processors, Del Monte Foods, USA, and National Industrial Transportation League; *Daniel Sweeney*, Attorney at Law, for National Small Shipments Traffic Conference and Drug & Toilet Preparations Traffic Conference; *David R. Wallace*, for State of California, Department of General Services; *Jon P. Adams*, for TNT Bestway Transportation; *Joseph E. MacDonald*, for Computer Movers, Inc. and Bekins Moving and Storage; *James D. Martens*, for California Dump Truck Owners Association; *Tad Muraoka*, for IBM Corporation; *F. V. Phillips*, for Cal-Carriers Freight Rating Service; *R. M. Zaller*, for Continental Can Company, Inc.; *William S. (Stan) Aylmer*, for Southern California Motor Delivery, Inc.; *Don Carnahan*, for Associated Traffic Service; *Fred D. Preston*, for AcTran; Wexler, Reynolds, Harrison & Schule, Inc., by *William K. Ris, Jr.*, for Americans for Safe and Competitive Trucking (ASCT); and *Gene Carmody, Lou Filipovich, Gary E. Haas, Daniel Huffman, Armand Karp, O. F. Marcantonio, William J. Monheim, Frank Spellman, Leon H. Carrington*, and *D. G. Redlingshafer*, for themselves.

Division of Ratepayer Advocates: *Ira R. Alderson* and *Ira Kalinsky*, Attorneys at Law, and *Christine Walwyn*.

Transportation Division: *Kenneth K Henderson*.

(END OF APPENDIX 1)

APPENDIX 2

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State of California Constitution

ARTICLE XII

SEC. 3. Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities.

SEC. 4. The commission may fix rates and establish rules for the transportation of passengers and property by transportation companies, prohibit discrimination, and award reparation for the exaction of unreasonable, excessive, or discriminatory charges. A transportation company may not raise a rate or incidental charge except after a showing to and a decision by the commission that the increase is justified, and this decision shall not be subject to judicial review except as to whether confiscation of property will result.

SEC. 5. The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

Public Utilities Code

451. All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable. (Former § 13; amended Stats. 1977, ch. 700.)

452. Nothing in this part shall be construed to prohibit any common carrier from establishing and charging a lower than a maximum reasonable rate for the transportation of property when the needs of commerce or public interest require. However, no common carrier subject to the jurisdiction of the commission may establish a rate less than a maximum reasonable rate for the transportation of property for the purpose of meeting the competitive charges of other carriers or the cost of other means of transportation which is less than the charges of competing carriers or the cost of transportation which might be incurred through other means of transportation, except upon such showing as is required by the commission and a finding by it that the rate is justified by transportation conditions. In determining the extent of such competition the commmission shall make due and reasonable allowance for added or accessorial service performed by one carrier or agency of transportation which is not contemporaneously performed by the competing agency of transportation. (Former § 13½.)

453. (a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

(b) No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, occupation, sex, marital status or change in marital status. A person who has exhausted all administrative remedies with the commission may institute a suit for injunctive

relief and reasonable attorney's fees in cases of an alleged violation of this subdivision. If successful in litigation, the prevailing party shall be awarded attorney's fees.

(c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(d) No public utility shall include with any bill for services or commodities furnished any customer or subscriber any advertising or literature designed or intended (1) to promote the passage or defeat of a measure appearing on the ballot at any election whether local, statewide, or national, (2) to promote or defeat any candidate for nomination or election to any public office, (3) to promote or defeat the appointment of any person to any administrative or executive position in federal, state or local government, or (4) to promote or defeat any change in federal, state, or local legislation or regulations.

(e) The commission may determine any question of fact arising under this section. (Former § 19; amended Stats. 1976, ch. 1174.)

454. (a) Except as provided in Section 454.1 and 455, no public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified. Whenever any electrical, gas, heat, telephone, water, or sewer system corporation files an application to change any rate, other than a change reflecting and passing through to customers only new costs to the corporation which do not result in changes in revenue allocation, for the services or commodities furnished by it, the corporation shall furnish to its customers affected by the proposed rate change notice of its application to the commission for approval of the new rate. This notice requirement does not apply to any rate change proposed by a corporation pursuant to an advice letter submitted to the commission in accordance with commission procedures for this means of submission. The procedures for advice letters may include provision for notice to customers or subscribers on a case-

by-case basis, as determined by the commission. The corporation may include the notice with the regular bill for charges transmitted to the customers within 45 days if the corporation operates on a 30-day billing cycle, or within 75 days if the corporation operates on a 60-day billing cycle. If more than one application to change any rate is filed within a single billing cycle, the corporation may combine the notices into a single notice if the applications are separately identified. The notice shall state the amount of the proposed rate change expressed in both dollar and percentage terms for the entire rate change as well as for each customer classification, a brief statement of the reasons the change is required or sought, and the mailing address of the commission to which any customer inquiries may be directed regarding how to participate in, or receive further notices regarding the date, time, or place of, any hearing on the application, and the mailing address of the corporation to which any customer inquiries relative to the proposed rate change may be directed.

(b) The commission may adopt rules it considers reasonable and proper for each class of public utility providing for the nature of the showing required to be made in support, of proposed rate changes, the form and manner of the presentation of the showing, with or without a hearing, and the procedure to be followed in the consideration thereof. Rules applicable to common carriers may provide for the publication and filing of any proposed rate change together with a written showing in support thereof, giving notice of the filing and showing in support thereof to the public, granting an opportunity for protests thereto, and to the consideration of, and action on, the showing and any protests filed thereto by the commission, with or without hearing. However, the proposed rate change does not become effective until it has been approved by the commission.

(c) The commission shall permit individual public utility customers and subscribers affected by a proposed rate change, and organizations formed to represent their interests, to testify at any hearing on the proposed rate change, except that the presiding officer need not allow repetitive or irrelevant testimony and may conduct the hearing in an efficient manner. (Amended Stats. 1974, ch. 194; 1976, ch. 135; 1984, ch. 1498; 1988, ch. 108.)

454.2. Notwithstanding Section 454, the commission may, upon application, establish a "zone of rate freedom" for any passenger stage transportation service which the commission finds is operating in competition with another substantially similar passenger stage transportation service or competitive passenger transportation service from any other means of transportation, if the commission finds that these competitive transportation services will result in reasonable rates and charges when considered along with the authorized zone of rate freedom. An adjustment in rates or charges within a zone of rate freedom established by the commission is hereby deemed just and reasonable. The commission may, upon protest or on its own motion, suspend any adjustment in rates or charges under this section and institute proceedings pursuant to Section 491. (Added Stats. 1984, ch. 142.)

455. Whenever any schedule stating an individual or joint rate, classification, contract, practice, or rule, not increasing or resulting in an increase in any rate, is filed with the commission, it may, either upon complaint or upon its own initiative, at once and if it so orders without answer or other formal pleadings by the interested public utility or utilities, but upon reasonable notice, enter upon a hearing concerning the propriety of such rate, classification, contract, practice, or rule. Pending the hearing and the decision thereon such rate, classification, contract, practice, or rule shall not go into effect. The period of suspension of such rate, classification, contract, practice or rule shall not extend beyond 120 days beyond the time when it would otherwise go into effect unless the commission extends the period of suspension for a further period not exceeding six months. On such hearing the commission shall establish the rates, classifications, contracts, practices, or rules proposed, in whole or in part, or others in lieu thereof, which it finds to be just and reasonable.

All such rates, classifications, contracts, practices, or rules not so suspended shall become effective on the expiration of 30 days from the time of filing thereof with the commission or such lesser time as the commission may grant, subject to the power of the commission, after a hearing had on its own motion or upon complaint, to alter or modify them. (Former § 63(b).)

460. No common carrier subject to the provisions of this part shall charge or receive any greater compensation in the aggregate for the transportation of persons or of a like kind of property for a shorter than for a longer distance over the same line or route in the same direction, within this State, the shorter being included within the longer distance or charge any greater compensation as a through rate than the aggregate of the intermediate rates. This provision does not authorize any such common carrier to charge or receive as great a compensation for a shorter as for a longer distance or haul.

Upon application to the commission a common carrier may, in special cases, after investigation, be authorized by the commission to charge less for a longer than for a shorter distance for the transportation of persons or property, and the commission may from time to time prescribe the extent to which such carrier may be relieved from the operation and requirements of this section. (Former § 24(a).)

461.5. No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state. It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates.

Upon application to the commission such company may, in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of persons or property and the commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul. The commission may authorize the issuance of excursion and commutation tickets at special rates.

Nothing contained in this section shall be construed to prevent the commission from ordering and compelling any railroad or other transportation company to make reparation to any shipper on account of the rates charged to such shipper being excessive or discriminatory, provided no discrimination will result from such reparation. (Added Stats. 1974, ch. 489.)

486. Every common carrier shall file with the commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges, and classifications for the transportation between termini within this state of persons and property from each point upon its route to all other points thereon; and from each point upon its route to all points upon every other route leased, operated, or controlled by it; and from each point on its route or upon any route leased, operated or controlled by it to all points upon the route of any other common carrier, whenever a through route and a joint rate has been established or ordered between any two such points. If no joint rate over a through route has been established, the schedules of the several carriers in such through route shall show the separately established rates, fares, charges, and classifications applicable to the through transportation. (Former § 14(a), 1st and 2 sents.)

487. The schedules shall plainly state the places between which property and persons will be carried, and the classification of passengers or property in force, and shall state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and all rules which may in any wise change, affect, or determine any part, or the aggregate of, such rates, fares, charges, and classifications, or the value of the service rendered to the passenger, shipper, or consignee. Schedules shall be plainly printed, and copies thereof shall be kept by every such carrier at such stations or offices of the carrier and subject to such conditions as the commission may determine and prescribe by order or rule. (Former § 14(a), 3d and 4th sents; amended Stats. 1963, ch. 2121.)

488. Subject to such rules as the commission may prescribe, the schedules of carriers shall be produced and made available for inspection upon the demand of any person. The form of every

such schedule shall be prescribed by the commission and shall conform, in the case of common carrier subject to the Interstate Commerce Act and the acts amendatory thereof and supplementary thereto, as nearly as possible to the form of schedules prescribed by the Interstate Commerce Commission. (Former § 14(a), last 3 sents; amended Stats. 1963, ch. 2121.)

491. Unless the commission otherwise orders, no change shall be made by any public utility in any rate or classification, or in any rule or contract relating to or affecting any rate, classification, or service, or in any privilege or facility, except after 30 days' notice to the commission and to the public. Such notice shall be given by filing with the commission and keeping open for public inspection new schedules stating plainly the changes to be made in the schedule or schedules then in force, and the time when the changes will go into effect. The commission, for good cause shown, may allow changes without requiring the 30 days' notice, by an order specifying the changes so to be made, the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any rate or classification, or in any form of contract or agreement or in any rule or contract relating to or affecting any rate, classification, or service, or in any privilege or facility, attention shall be directed to such change on the schedule filed with the commission, by some character to be designated by the commission, immediately preceding or following the item. (Former § 15.)

493. (a) No common carrier subject to this part shall engage or participate in the transportation of persons or property, between points within this state, until its schedules of rates, fares, charges, and classifications have been filed and published in accordance with this part.

494. No common carrier shall charge, demand, collect, or receive a different compensation for the transportation of persons or property, or for any service in connection therewith, than the applicable rates, fares, and charges specified in its schedules filed and in effect at the time, nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, except upon order of the commission as provided in this part, nor extend to any corporation or person any

privilege or facility in the transportation of passengers or property except such as are regularly and uniformly extended to all corporations and persons. (Former § 17(a)2.)

494. (a) For purposes of this section —

(1) The term "carrier" means any common carrier subject to regulation under this part.

(2) The term "antitrust laws" means the provisions of Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code, relating to combinations in restraint of trade.

(b) Any carrier which is a party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the commission may prescribe, apply to the commission for approval of the agreement, and the commission shall by order approve any such agreement, if approval thereof is not prohibited by subdivision (d), (e), or (f), if it finds that the agreement and rules, regulations, and procedures provided for the operation thereof are fair and reasonable and not contrary to public policy; otherwise the application shall be denied. The approval of the commission shall be granted only upon such terms and conditions as the commission may prescribe as necessary to enable it to grant its approval in accordance with this subdivision.

(c) Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the commission under the provisions of this section shall maintain such accounts, records, files, and memoranda and shall submit to the commission such reports, as may be prescribed by the commission, and all such accounts, records, files, and memoranda shall be subject to inspection by the commission or its duly authorized representatives.

(d) The commission shall not approve under this section any agreement between a carrier by highway and a carrier by rail unless it finds that the agreement is of the character described in subdivision (b) and is limited to matters relating to transportation under joint rates or over through routes.

(e) The commission shall not approve under this section any agreement which it finds is an agreement with respect to the pooling or division of traffic, service, or earnings, unless the commission finds that the agreement will be in the interest of better service to the public or of economy of operation resulting in efficient utilization of fuel and will not unduly restrain competition.

(f) The commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure.

(g) The commission may, upon complaint or upon its own initiative without complaint, investigate and determine whether any agreement previously approved by it under this section, or any term or condition upon which the approval was granted, is not in conformity with subdivision (b), or whether any such term or condition is not necessary for purposes of conformity with subdivision (b). After the investigation, the commission may by order terminate or modify its approval of such agreement if it finds such action necessary to insure confomrity with subdivision (b), and may modify the terms and conditions upon which the approval was granted to the extent it finds necessary to insure conformity with subdivision (b) or to the extent it finds the terms and conditions unnecessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, may be postponed for such period as the commission determines is reasonably necessary to avoid undue hardship.

(h) No order shall be entered under this section except after interested parties have been afforded reasonable opportunity for hearing.

(i) The parties to any agreement approved by the commission under this section and other persons are, if the approval of the agreement is not prohibited by subdivision (d), (e), or (f), hereby excepted from the antitrust laws with respect to the agreement under the terms and conditions prescribed by the commission.

(j) Any action of the commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or in prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of subdivision (i). (Added Stats. 1973, ch. 908; amended Stats. 1980, ch. 1063.)

701. The commission may supervise and regulate every public utility in the state and may do all things, whether specifically designated in this part or in addition, thereto, which are necessary and convenient in the exercise of such power and jurisdiction. (Former § 31.)

726. It is the policy of the State in rate making to be pursued by the commission to establish such rates as will promote the freedom of movement by carriers of agricultural commodities, including livestock, at the lowest lawful rates compatible with the maintenance of adequate transportation service.

In any rate proceeding where more than one type or class of carrier, as defined in this part or in the Highway Carriers' Act, is involved, the commission shall consider all such types or classes of carriers, and, pursuant to the provisions of this part or the Highway Carriers' Act, fix as minimum rates applicable to all such types or classes of carriers the lowest of the lawful rates so determined for any such type or class of carrier. This provision does not prevent the commission from granting to carriers by water such differentials in rates as are permitted under other provisions of law. (Former § 32(d).)

730. The commission shall, upon a hearing, determine the kind and character of facilities and the extent of the operation thereof, necessary reasonably and adequately to meet public requirements for service furnished by common carriers between any two or more points, and shall fix and determine the just, reasonable, and sufficient rates for such service. Whenever two or more common carriers are furnishing service in competition with each other, the commission may, after hearing, when necessary for the preservation of adequate service and when public interest demands, prescribe uniform rates, classifications, rules and practices to be charged, collected, and observed by all such common carriers. (Former § 32(c).)

731. Whenever the commission, after a hearing, finds that any rate or toll for the transportation of property is lower than a reasonable or sufficient rate and that the rate is not justified by actual competitive transportation rates of competing carriers, or the cost of other means of transportation, the commission shall prescribe such rates as will provide an equality of transportation rates for the transportation of property between all such competing agencies of transportation. When in the judgment of the commission a differential is necessary to preserve equality of competitive transportation conditions, a reasonable differential between rates of common carriers by rail and water for the transportation of property may be maintained by such carriers, and the commission may by order require the establishment of such rates. (Former § 32½.)

3662. The commission shall, upon complaint or upon its own initiative without complaint, establish or approve just, reasonable, and nondiscriminatory maximum or minimum or maximum and minimum rates to be charged by any highway permit carrier for the transportation of property and for accessorial service performed by it.

In establishing or approving such rates, the commission shall give due considerations to the cost of all of the transportation services performed, including length of haul, any additional transportation service performed, or to be performed, to, from, or beyond the regularly established termini of common carriers or of any accessorial service, the value of the commodity transported,

and the value of the facility reasonably necessary to perform the transportation service. (Added Stats. 1951, ch. 764.)

3666. If any highway carrier other than a highway common carrier desires to perform any transportation or accessorial service at a lesser rate than the minimum established rates, the commission shall, upon finding that the proposed rate is reasonable, authorize the lesser rate for not more than one year. (Added Stats. 1951, ch. 764; amended Stats. 1959, ch. 1566; 1986, ch. 336.)

APPENDIX 3

Revised Page 1

GENERAL ORDER 80-C

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

RULES GOVERNING THE CONSTRUCTION AND FILING OF TARIFFS BY HIGHWAY COMMON CARRIERS, FREIGHT FORWARDERS, EXPRESS CORPORATIONS, AND SCHEDULES FILED BY CERTAIN HIGHWAY CONTRACT CARRIERS

Adopted February 7, 1990. Effective March 15, 1990.

Decision 89-10-039, as modified by Decision 90-02-021 in I.88-08-046.

RULE A APPLICATION AND SCOPE

A.1 This General Order governs the construction and filing of:

a. Tariffs by highway common carriers, freight forwarders and express corporations; and

b. Schedules by highway contract carriers for transportation subject to General Order 147 Series.

A.2 Tariffs and contract rate schedules, filed on or after the effective date of this General Order shall be constructed and filed in conformity with the rules herein established.

A.3 Tariffs filed prior to the effective date of this General Order need not be reissued because of the issuance of this General Order. Supplements, amendments or revised pages filed on or after the effective date of this General Order, however, shall be constructed and filed in conformity with the rules herein established.

RULE 1—DEFINITIONS

"Carrier" means a highway common carrier, a highway contract carrier, a freight forwarder, or an express corporation.

"Common carrier" means a common carrier subject to this general order.

"Contract carrier" means a highway contract carrier subject to this general order.

"Contract Rate Schedule" (schedule) means the publication of a highway contract carrier which includes the rates, routes, distances, classifications, etc., including supplements, amendments or revised pages, or reissues, and which is on file with the Commission.

"Governing Publication(s)" means those publications which govern the application of a common carrier tariff or contract carrier rate schedule. Each governing publication shall be on file and authorized for use for the concerned carrier by this Commission. Examples of such publications are:

> Distance Table 8 and/or the Optional All Points to All Points Table for Distance Table 8 issued by the Commission, and amendments or reissues thereto;
>
> Hazardous Materials Tariff ATA, 111-G (Cal. PUC 17 of American Trucking Association, Inc., Agent), including supplements and reissues;
>
> National Motor Freight Classification NMF 100-M (CAL. PUC 24 of National Motor Freight Traffic Association, Inc., Agent), including supplements and reissues (also referred to as the "Governing Classification").

"Rate bureau" means each conference, bureau, committee or other organization approved by the Commission under Public Utilities Code (Code) Section 496 and authorized to engage in collective ratemaking.

"Tariff" means the publication of a highway common carrier, freight forwarder or express corporation containing rates and rules, operating rights, routes, distances, classifications, etc., in-

cluding supplements, amendments or revised pages, or reissues, and which is on file with the Commission.

"Tariff or Contract Rate Schedule Publishing Agent" means an individual or corporation authorized by a common carrier, freight forwarder or express corporation to publish tariffs on its behalf or a contract carrier to publish schedules on its behalf.

RULE 2—EXCEPTIONS

The provisions of this General Order do not apply to transportation by independent contractor subhaulers when such transportation is performed for other carriers. However, when there is a unity of ownership, management or control between the principal carrier and the consignor, consignee or debtor, subhaulers engaged by a principal carrier shall be paid 100% of the rate of the prime carrier.

RULE 3—REFERENCE TO PUBLIC UTILITIES CODE PROVISIONS

3.1 Unless the Commission otherwise orders, or provisions of another General Order (for example, General Order 147 Series) apply, a rule or rate in a tariff or contract rate schedule shall not go into effect on less than 30 days' notice.

3.2 The carrier shall observe all pertinent sections of the Code. This General Order's requirements are in addition to and supplementary to those Code provisions regarding the preparation, construction and filing of tariffs shown in the Code.

3.3 General Order 147 Series and the Commission's Rules of Practice and Procedure are applicable to the filing of formal applications for rate and tariff changes before the Commission.

RULE 4—FILING

Filing—Tariffs and schedules shall be filed with the Commission in duplicate in one package, and shall be delivered or addressed to:

California Public Utilities Commission
Tariff File Room—2nd floor

505 Van Ness Avenue
San Francisco, California 94102

A receipt can only be obtained by enclosing a duplicate of the carrier's letter of transmittal with the request for a receipt which will then be stamped and returned as a receipt. A stamped, self-addressed envelope shall be included.

RULE 5—AUTHORITY AND RESPONSIBILITY

5.1 Authority—All tariffs, schedules, and their amendments and supplements, including any rate item changes, shall cite the authority from the Commission for their publication, except as otherwise provided below.

> A contract carrier may file a rate schedule that contains rates some of which, or all, are not referenced in any contract. These rates will be accepted only if the contract rate schedule includes the following statement:
>
> "Rates in this contract rate schedule apply only when they are specifically referenced in a contract which (carrier's name) has filed with the Commission."
>
> The contract rate schedule shall clearly indicate which rates in the schedule are referenced in a contract the carrier has filed with the Commission.

5.2 Responsibility—It shall be the responsibility of the carrier to maintain tariffs and schedules at all times in a current condition.

RULE 6—FORM OF TARIFFS AND SCHEDULES

6.1 Form—Tariffs and schedules shall be filed in book (pamphlet) or loose-leaf form. Tariffs and schedules shall be plainly printed, mimeographed, typewritten or reproduced by other durable process on paper of good quality. Dot matrix printed pages shall be of sufficient contrast to be easily readable and readily reproducible by ordinary commercially marketed copy machines.

6.2 Permissive Alternative—Rules 6.1, 6.5(b) and (c), 6.6(b), (c) and (d), 6.7(a), (b), (c), and (d), 6.8, 7.1, 7.2, 7.3 and 7.4 may be waived only on tariffs which contain both

interstate and California intrastate rates. Such publications may be prepared in conformity with the regulations of the Interstate Commerce Commission in Title 49 Code of Federal Regulations Part 1312, providing orders of this Commission are complied with.

6.3 Size—Tariffs and schedules shall be not less than 8 by 10½ inches nor more than 8½ by 11 inches in size.

6.4 California P.U.C. Number—Each carrier shall file tariffs and schedules under its own consecutive numbers beginning with CA.P.U.C. No.1 for its tariffs and CA.P.U.C. No.1 for its schedules. An agent shall file under its own series of CA.P.U.C. numbers beginning with CA.P.U.C. No. 1 for its tariffs and CA.P.U.C. No. 1 for its schedules. Separate tariffs or schedules shall bear separate CA.P.U.C. numbers. The assigned CA.P.U.C. number in the series of the carrier, bureau, or agent initially issuing the tariff or schedule shall be retained throughout the life of each type of publication.

6.5 Title Page—The title page of each tariff or schedule shall show:

(a) The CA.P.U.C. number of the tariff in either the upper left-hand corner or upper right-hand corner and immediately thereunder the CA.P.U.C. number of any tariffs or schedules canceled thereby.

(b) The name of the issuing carrier, bureau or agent, and the name and address of the issuing officer or agent.

(c) A statement indicating the kind of tariff, i.e., whether it is a tariff of rates, classifications, distances, scope of operations, etc.

(d) A carrier's individual tariff or schedule shall show its CA. "T" No., as well as any designated identification contained in the National Motor Freight Association's "Directory of Standard Multi-Modal Carrier and Tariff Agents Codes."

(e) The date on which the tariff or schedule will become effective in the lower right-hand corner.

6.6 Loose-Leaf Tariff or Schedule—Each page or supplement of a loose-leaf tariff or schedule shall show:

(a) The assigned CA.P.U.C. number of the tariff or schedule in neither the upper left-hand corner or the upper right-hand corner.

(b) The name of the issuing carrier, bureau, or agent; and the name and address of the issuing officer or agent.

(c) The page number; e.g., "Original Page 1," "Original Page 2," "Third Revised Page 3," etc.

(d) The date on which the page will become effective (or appropriate reference thereto), in the lower right-hand corner.

(e) On an original tariff or schedule which has not yet been accepted for filing by the Commission staff the effective date need only be shown on the Original or Revised Title Page. Each subsequent Original Page which is submitted as part of the original filing shall show reference to the Title Page for the effective date of the tariff.

6.7 Contents of Tariff or Schedule—A Schedule shall contain only those provisions shown in Rules 6.7(a), (c), (d), and (g). A tariff shall contain all of the following:

(a) A Table of Contents.

(b) The name of each participating carrier when a bureau or agency tariff is involved.

(c) Reference to other publications which govern the application of the tariff or schedule, such as: classification, distance table, and scope of operations.

(d) An alphabetically arranged index of all articles or generic groupings upon which commodity rates are

named or ratings provided with reference to the items or pages where rates or ratings are placed.

(e) Tariffs naming rates or distances shall contain a complete description of each carrier's certificated operative rights. Governing scope of operations which are properly cross-referenced to the other tariffs of the carrier in accordance with Rule 6.7 (h) will satisfy this requirement.

(f) When routes are required for purposes of rates or charges, the routes or named points shall be clearly described and defined in the tariff. Point-to-point rates shall show the route or named points over which intermediate application is available or cite the authority granting relief from Code Sections 460 and 461.5.

(g) Each tariff or schedule shall have the following rule in its entirety:

"Whenever a class rate and a commodity rate are named between specified points, the lower of such rates is the lawful rate."

"In the event two or more rates, including applicable discounts, are named in a tariff, tariffs, or schedules of the carrier for the same transportation, the lowest shall apply."

In the event that a combination of rates makes a lower aggregate through rate than a single rate, the lower combination shall apply. The carrier shall immediately publish the lower combination rate.

(h) Except for governing publications such as a Distance Table, Classification, or Hazardous Materials Tariff, all tariffs which a carrier issues or in which it participates or concurs shall be cross-referenced. Carriers may use a named governing tariff such as a scope of operations tariff for listing all of their filed tariffs. All bureaus, agencies and individuals shall cross-reference those tariffs of related appli-

cation which the carrier has on file with the Commission.

6.8 Amendments—

(a) Book (pamphlet) tariffs shall be amended by filing supplements constructed generally in the same manner and arranged in the same order as the tariff being amended, and referring to the page, item, or index of the tariff or previous supplement which it amends.

(b) Loose-leaf tariffs or schedules shall be amended by filing new pages on which changes are made as consecutively numbered revisions of the previous pages, e.g., "First Revised Page 10 cancels Original Page 10." A loose-leaf tariff may be cancelled by supplement.

(c) Uniform symbols shall be used to indicate changes as follows:

Letter (A), (a), or < > to indicate increases.

Letter (R), (r), or to indicate reductions.

Letter (C), (c), or ▲ to indicate a change resulting in neither increase nor reduction.

(d) The following symbols shall be used only for the purposes indicated:

* to show new material added to the tariff.

+ to show "Applicable to intrastate traffic only."

to indicate "Applicable to interstate traffic only."

[ ] to indicate reissued matter.

● to indicate no change, as provided in Rule 6.8(e).

(e) When changes of the same character are made in all or substantially all rates in a tariff, schedule, supplement or loose-leaf page, that fact and nature of the change may be indicated on the title page, supplement, or the top of a loose-leaf page of the

tariff or schedule. In this event, the symbol "●" shall be used to indicate a rate to which no change has been made. Any other change not indicated in the general statement shall bear the appropriate symbol(s) in Rule 6.8(c) or (d).

RULE 7—ADOPTION OF TARIFFS

7.1 Adoption Notice—When operative rights of either a common or contract carrier are transferred from the operating control of one company to that of another, the succeeding carrier shall issue an adoption notice in the form of a one-page document, 8½ by 11 inches in size, in which the successor company accepts and establishes as its own all the affected tariffs, schedules, and other instruments issued by or on behalf of the predecessor company in accordance with the Commission order authorizing the transfer of the operative rights. Three copies of the adoption notice shall be filed with the Commission.

7.2 Copies to Agents and Carriers—Concurrently with the filing of an adoption notice with the Commission, a copy of the adoption notice shall be furnished to each agent and each carrier publishing tariffs or schedules containing rates or other provisions in which the predecessor carrier participates.

7.3 Supplements—In addition to the adoption notice required by Rule 7.1, the successor carrier shall supplement or reissue each tariff or schedule by the predecessor company indicating that the tariff or schedule has been adopted by the successor company, such filing to be made in accordance with Commission orders authorizing the transfer.

7.4 Change of Name—When a carrier changes its legal or fictitious name, without transfer of control from one company to another, it shall immediately amend tariffs or schedules issued by it to show the new name of the company. The carrier shall also immediately inform, in writing, all agents or other carriers issuing tariffs in which it participates of the change in name, and such agents or carriers shall promptly amend such tariffs to show the change in name. The tariff or schedule amendments shall show the new name of the carrier and its former name, for example:

"ABC Transportation Co. (formerly XYZ Trucking Co.)," and shall show that they are filed under authority of this rule.

RULE 8—POWERS OF ATTORNEY AND CONCURRENCES

8.1 Issuance.

(a) Each carrier shall issue a power of attorney to each agent publishing an agency tariff in which the carrier participates.

(b) Each carrier shall issue a concurrence to each other carrier which publishes a tariff in which the former carrier participates.

8.2 Filing—Powers of attorney, concurrences, and revocations of powers of attorney and concurrences shall be made available upon request from the Commission or its staff.

8.3 Revocation by Carrier—Powers of attorney and concurrences may be revoked by the carrier by furnishing to the tariff publishing agent a revocation notice specifying the effective date of such revocation. The notice shall be sent by certified or registered mail at least 60 days before the effective date of revocation.

RULE 9—REVOCATION OF CARRIER PARTICIPATION BY TARIFF AGENT

9.1 Procedure—A carrier's participation in any agency tariff may be cancelled by the tariff agent issuing such tariff without the request or consent of the carrier, providing the procedures specified in Rule 9 are followed precisely.

9.2 Prior Notice—Tariff publishing agents proposing to terminate their agency relationship with any carrier, and to cancel the carrier's participation in any agency tariff, shall give notice in writing to the carrier and to the Commission not less than 90 days before the proposed date of termination and cancellation. The Cancellation Notice shall be in the form provided in Rule 9.5.

9.3 Tariff Filing—Unless the Cancellation Notice is rescinded as provided in Rule 9.4, the cancellation of the carrier's

participation in the agency tariff shall be made effective on the precise effective date specified in the Cancellation Notice, by an appropriate tariff amendment filed with the Commission not less than 30 days prior to said effective date.

9.4 Rescission of Notice—If the tariff publishing agent desires to rescind the Cancellation Notice, the agent shall give notice in writing to the carrier and to the Commission not less than 30 days prior to the scheduled date of termination and cancellation of the agency relationship. The Rescission of Cancellation Notice shall be in the form provided in Rule 9.6.

9.5 Form of Cancellation Notice—The Cancellation Notice specified in Rule 9.2 shall be on paper 8½ by 11 inches in size, and shall be in a form substantially as follows:

CANCELLATION NOTICE

To ______________________________________

(Name of Carrier)

Date of Notice ______________________________

You are hereby notified that the agency created by the Power of Attorney issued by you to the undersigned is terminated on the effective date shown below.

Your participation in tariff(s) issued by the undersigned, as identified below, will be cancelled on the effective date shown.

You are cautioned that cancellation of your participation in such tariffs will leave you without rates on file with the California Public Utilities Commission. It is your responsibility to arrange for the filing with the California Public Utilities Commission of tariffs required by Section 486 of the California Public Utilities Code.

Name and Cal. P.U.C. Numbers of Tariffs:

____

____

Effective Date of Termination of Agency and Cancellation of Rates ______________________ *

* The agent shall not insert a date less than 90 days after the date the Notice is received by the Commission.

By ______________________
(Tariff Agent)

Instructions: This Notice shall be furnished by the agent to the carrier by registered mail at least 90 days before the effective date of termination and cancellation. A true copy of this Notice shall be filed with the Public Utilities Commission of the State of California, Truck Tariff Section—2nd floor, 505 Van Ness Avenue, San Francisco, California, 94102, at least 90 days before said effective date.

9.6 Form of Rescission of Cancellation Notice—The Rescission of Cancellation Notice specified in Rule 9.4 shall be on paper 8½ by 11 inches in size, and shall be in a form substantially as follows:

To ______________________ __________
(Name of Carrier) (Date)

The Cancellation Notice issued to you by the undersigned on __________ to terminate the agency created by the Power of Attorney issued by you to the undersigned, is hereby rescinded.

Your participation in tariff(s) issued by the undersigned, as identified below, will not be canceled.

Name and Cal. P.U.C. Numbers of Tariffs.

____

____

By ______________________
(Tariff Agent)

Instructions: This Rescission shall be furnished to the carrier by the Tariff Agent by registered mail at least 30 days before the effective date of the scheduled termination and cancellation stated in the "Cancellation Notice" which it rescinds. A true copy of this Rescission shall be filed with the Public Utilities Commission of the State of California, Tariff File Room—2nd Floor, 505 Van Ness Avenue, San Francisco, California 94102, at least 30 days before said effective date.

Approved and dated Feburary 7, 1990, to become effective March 15, 1990, at San Francisco, California.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

By Wesley Franklin
Acting Executive Director

(END OF APPENDIX 3)

APPENDIX 4

Revised Page 1

GENERAL ORDER 147-B

PUBLIC UTILITIES COMMISSION OF THE

STATE OF CALIFORNIA RULES GOVERNING TARIFF FILINGS BY COMMON CARRIERS AND CONTRACT FILINGS BY CONTRACT CARRIERS

Adopted February 7, 1990. Effective March 15, 1990.

Decision 89-10-039, as modified by Decision 90-02-021 in I.88-08-046.

RULE 1—APPLICATION AND EXCEPTIONS

1.1 Tariffs, contracts, and contract rate schedules, supplements, amendments, or revised pages filed to become effective on or after the effective date of this General Order shall conform with the rules herein established.

1.2 When provisions of this General Order are in conflict with the Commission's Rules of Practice and Procedure, the provisions of this General Order shall apply.

1.3 Except as otherwise provided, the carriers listed below are subject to this General Order:

(a) Highway common carriers as defined in Public Utilities Code (Code) Section 213;

(b) Highway contract carriers as defined in Code Section 3517.

1.4 The provisions of this General Order do not apply to transportation by independent contractor subhaulers when such transportation is performed for other carriers. However, when there is a unity of ownership, management, or control between the principal carrier and the consignor, consignee or debtor, subhaulers engaged by a principal carrier shall be paid 100% of the rate of the prime carrier.

1.5 The provisions of this General Order do not apply to rate exempt transportation by highway common carriers or highway contract carriers, nor do they apply to transportation performed by individual carriers which have been specifically exempted by Commission order.

1.6 The provisions of this General Order do not apply to transportation governed by General Orders 149 Series, 150 Series, or 151 Series.

RULE 2—DEPARTURES

Departure from the provisions of this General Order may be granted upon formal application to the Commission and after the Commission finds that such departure is reasonable and necessary.

RULE 3—DEFINITIONS

For the purpose of this General Order and when used in tariffs, contracts, or contract rate schedules filed under this General Order, the definitions for the following terms shall apply:

3.1 "Base Rate" means the lowest rate legally on file within the last 12 months, unless that rate was effective for less than 30 days. Refer to Rule 7 for requirements on changes to base rate.

3.2 "Carrier's Equipment" means any motor truck, tractor or other highway vehicle, trailer, semitrailer, or any combination of such highway vehicles, operated by the carrier or its subhauler.

3.3 "Commission" means the Public Utilities Commission of the State of California.

3.4 "Common Carrier" means every highway common carrier described in Rule 1.3(a). Pursuant to Commission Order, common carriers subject to this General Order shall serve at least one day per week each point for which they have filed a tariff, if service is requested.

3.5 "Common Carrier Contract" means a contract for common carrier service filed by a contract carrier that also holds common carrier authority. A common carrier contract must be designed to yield rates equivalent to the carrier's tariff rates in effect at the time the contract is filed.

3.6 "Contract" means a bilateral agreement in writing which binds both contract carrier and the consignor, consignee, or other party to good faith performance. Contract duration shall be limited to one year. For terms of contract, see Rule 6.

3.7 "Contract Carrier" means every highway contract carrier described in Rule 1.3(b)

3.8 "Contract Rate Schedule" means a publication containing the rates and charges of contract carrier(s), including rules, regulations, and provisions governing the service(s) of the carrier(s). This includes supplements, amendments, revised pages, or reissues of the publication filed by contract carriers.

3.9 "Equivalent Rate" means a common carrier contract rate which, when filed, produces the same charge as does the common carrier's tariff rate applied to the same shipment or shipments.

3.10 "Floor Price" means the lower bound of the zone of reasonableness. The floor price is established by the Commission and is based on variable costs. There are separate floor prices for truckload and less-than-truckload carriage.

3.11 "Governing Publication(s)" means those publications which govern the application of a common or contract carrier rate. Examples of such publication are:

> Distance Table 8 and/or the Optional All Points to All Points Table for Distance Table 8 issued by the Commission, and amendments or reissues thereto;
>
> Hazardous Materials Tariff ATA, 111-I (Cal. PUC 19 of American Trucking Association, Inc., Agent) including supplements and reissues; and
>
> National Motor Freight Classification NMF 100-P (Cal. PUC 28 of National Motor Freight Traffic Association, Inc., Agent), including supplements and reissues (also referred to as the "Governing Classification").

3.12 "Independent Contractor/Subhauler" means any carrier who renders service for a principal carrier, for a specified recompense, for a specified result as to the work only and not as to the means by which such result is accomplished. This term includes sub-subhaulers when such carriers are engaged by other subhaulers.

3.13 "Less-than-truckload rate" means any rate not subject to the "truckload rate" minimum weight.

3.14 "Point" means a particular city, town, community, extended area, metropolitan zone, or other area which is described or named in a tariff or contract rate schedule for the application of rates.

3.15 "Rate" means the figure stated in cents, dollars and cents, or their fractions, including the charge, and also, the minimum weight or volume and rules or conditions governing the application of the rate, and any accessorial charges to be used in computing the charge on the property transported.

3.16 "Rate Bureau" means each conference, bureau, committee, or other organization established or continued under any agreement approved by the Commission under the provisions of PU Code Section 496.

3.17 "Rate Exempt Transportation" means transportation of commodities or transportation within the geographic areas described in the most recent Commission publication, including any revisions, entitled "Commodities and Geographic Areas Exempt From Rate Regulation".

3.18 "Special Contract" means a contract for service or under conditions which meet either of the terms (a) or (b) below:

(a) The contract provides services over a period of not less than 30 days and includes more than a single shipment, and meets either of the terms (1) or (2) below:

(1) The carrier earns a minimum of $ 1,000 per month for delivered transportation services, or

(2) The contract calls for substantial shipper obligations not normally provided under common carrier tariff rates by any carrier.

(b) The contract provides services not normally provided under common carrier tariff rates by any carrier.

3.19 "Tariff" means a publication containing the rates and charges of common carrier(s) including operating rights (scope of operations), rules, regulations, and provisions governing the service(s) of the carrier(s) including supplements, amendments, or revised pages or reissues. Refer to General Order 80 Series for rules governing construction and filing of tariffs.

3.20 "Truckload rate" means any rate which requires a minimum weight of 12,000 pounds or greater.

3.21 "Zone of Reasonableness" means a zone within which common carriers may individually set rates without further Commission approval. The upper end of the zone is cumulative rate increases not greater than 10% over a 12-month period. (Refer to Rule 7.2.) The lower bound of the zone is the floor price, which is based on variable costs and is set by the Commission. (Refer to Rule 7.4.)

RULE 4—FILING PROCEDURES

4.1 Two copies of tariff, contract, and contract rate schedule filings, including any supplements or amendments, shall be delivered or mailed to:

California Public Utilities Commission
Tariff File Room—2nd Floor
505 Van Ness Avenue
San Francisco, CA 94102

4.2 Rate Filing Transmittal and Date Filed

(a) All tariff, contract, and contract rate schedule filings shall be accompanied by the Rate Filing Transmittal form, attached to this General Order, which shall provide: (1) the carrier's name as it appears on the carrier's operating authority; (2) the carrier's T-number; (3) the tariff and item number(s), the contract number, or the contract rate schedule number of the tariff, contract or contract rate schedule filing; and (4) the shipper's name as it appears on the contract.

(b) If a receipt for the filings is desired, the transmittal shall be sent in duplicate with a self-addressed stamped envelope. One copy will be stamped and returned as a receipt.

(c) The date stamped "received" will reflect the date the document is filed with the Truck Tariff Section in San Francisco. Once stamped received, such rate filings shall be listed on the Commission's Daily Transportation Calendar within 3 working days after the date filed. Tariffs, contracts, contract rate schedules, and supporting documents shall be filed in a single package which shall also include the transmittal required to accompany the filing.

4.3 All contracts and tariffs filed will be available for public inspection at the Commission's office in San Francisco.

RULE 5—TARIFF FILINGS BY COMMON CARRIERS

5.1 Common carriers shall file tariffs in accordance with the requirements of Division 1 of the Code and General Order 80 Series.

5.2 Nothing in this rule shall prohibit carriers from publishing their own tariffs, or from joining in tariffs issued by rate bureaus or tariff publishing agents.

5.3 Common carrier tariffs shall not be designed to be shipper specific.

5.4 All common carrier tariffs shall describe accurately and fully the services offered to the public, provide the specific rate or the basis for calculating charges for the performance of those services, and show all related classifications, rules, and practices. Tariffs should be filed and maintained in a way that allows all users to determine the exact charges for any given shipment, including all available discounts. Discounts shall be identified in the tariffs, along with the qualifying criteria. Freight bill information is covered by General Order 155 Series.

5.5 Common carrier tariffs may become effective as provided in Rule 8.1.

5.6 Every common carrier shall maintain and keep open for public inspection a copy of its tariffs, and any revisions or supplements in accordance with General Order 122 Series.

RULE 6—CONTRACT FILINGS BY CONTRACT CARRIERS

6.1 No contract carrier shall perform any transportation or accessorial service until it has on file and in effect with the Commission two copies of an executed binding contract for such service.

6.2 Contract carriers shall strictly observe, as their exact rates, the rates and provisions of their contracts.

6.3 Contracts shall contain a specific termination date. Contract service shall not be made effective for more than one year.

All contracts may be renewed by filing an amendment with the Commission.

6.4 Every contract carrier shall keep and maintain for the Commission's inspection all contracts for a period of three years after the termination date of each contract.

6.5 Every contract carrier shall maintain and keep open for public inspection a copy of its contracts and contract rate schedules, and any revisions, amendments, or supplements in accordance with General Order 80 Series and 122 Series.

6.6 Every contract shall contain:

(a) The name, address, signature, and "T" file number of the carrier.

(b) The name, address, and signature of the shipper.

(c) Thedate the contract was executed, the effective date, and the duration of the contract.

(d) The geographic area involved in performance, such as the route(s) and/or points.

(e) A description of all services to be provided, the commodities involved, and the projected tonnage (or other appropriate unit of measurement) to be transported.

(f) The compensation to be paid and received. Rates shall be stated in their entirety as part of the contract, unless reference is made to rates in the tariff provisions which govern the carrier's highway common carrier operating authority, in the carrier's contract rate schedule, or any governing publication filed with the Commission by that carrier. (Exception: A contract carrier may refer to official publications of the Commission without filing those documents.)

(g) A provision specifically acknowledging the tariff and item number, contract rate schedule or governing publication containing the rates to apply in the contract and the date of the rates to apply by

reference, including a statement that the rate will not change unless an amendment to the contract is filed, or a statement clearly indicating the circumstances under which the rates to apply by reference will change without further amendment to the contract.

(h) The conditions, if any, under which changes in compensation or other terms of the contract may be made by the parties.

(i) Such explanatory statements as are necessary to remove all reasonable doubt as to its proper application.

6.7 Contracts shall be plainly typed, or prepared by other similar durable process, on letter-size (not less than 8 x 10½ inches nor larger than 8½ x 11 inches) paper of good quality and shall be clear and legible.

6.8 Each carrier shall issue contracts under the "T" file number assigned to it by the Commission with a suffix number beginning with the number 1. Subsequent contracts shall bear consecutive suffix numbers. The contract number shall appear on every page in the following manner:

"CONTRACT NUMBER
CAL T-000-1"

6.9 A contract or an amendment which is required or authorized to be filed by a Commission decision shall refer to that decision in connection with the item or supplement which incorporates the change resulting from the decision, or shall refer to the appropriate provision of this general order permitting or requiring the change.

Contracts may be amended by filing a supplement or by filing new pages on which changes are made. Revised pages shall be identified as consecutively numbered revisions of the previous page, e.g., "First Revised Page 2 Cancels Original Page 2."

6.10 A contract supplement or amendment to a contract shall contain:

(a) Those requirements set forth in Rule 6 necessary to clearly and effectively identify and amend the original contract.

(b) Reference to the item number, page number, and/or previous supplement number which it amends.

(c) The signatures of both the shipper and the carrier.

(d) The effective date of the amendment or supplement.

6.11 When a carrier changes its name as shown in the Commission's records, without transfer of control from one company to another; or when a shipper with which the carrier has a contract changes its name, whether or not control is transferred from one company to another, the carrier shall immediately amend all affected contracts it has issued to reflect the change. The required amendment to each contract in effect may be accomplished by filing a supplement containing a provision that "whenever the name (enter the old name) appears it shall be construed as meaning (enter the new name)."

6.12 The Commission shall be notified in writing when a contract is cancelled prior to the expiration date contained in the contract. Unless an amendment is filed with the Commission extending the duration of the contract, it shall be considered cancelled on the expiration date.

6.13 Common carrier contracts may only be filed by contract carriers which also hold common carrier authority. Common carrier contracts must initially provide service at rates equal or equivalent to the common carrier's tariff rates in effect at the time the contract is filed. Common carrier contracts may become effective as provided in Rule 8.1. Common carrier contracts may lock in rates over the term of the contract, or rate changes over the term of the contract may be based on the common carrier's filed tariff rates or economic factors identified in the contract. However, rates may not be lower than the common carrier's tariff

rates in effect at the time the contract is filed. Common carrier contracts may be effective for up to one year, and may be renewed by amendment, subject to the terms of Rule 7.

Common carrier contracts shall require the carrier to be liable for loss and damage to the same extent it is liable under common carrier tariffs.

6.14 Special contracts are for service or under conditions defined in Rule 3.18. Special contracts may be filed by contract carriers whether or not they also are common carriers. Contract carriers that do not also have common carrier authority may only file special contracts. Special contracts may be effective for one year, may be renewed by amendment, and must specify an expiration date.

RULE 7—REQUIREMENTS FOR RATE CHANGES AND RATE ESTABLISHMENT

7.1 Establishing Rates

(a) Common carriers shall establish rates in their tariffs by filing the appropriate tariffs accompanied by the Floor Price Certification form required by Rule 7.4, attached to this General Order.

(b) Contract carriers shall establish rates in common carrier contracts by filing rates at or equivalent to the carrier's own common carrier tariff rates in effect at the time the contract is filed.

Common carrier contracts must cite the source of the carrier's equivalent tariff rates by tariff and item number(s).

Contract carriers may provide for an automatic adjustment to the rates in a common carrier contract, and must specify the method by which and at what points in time the rate adjustment(s) will occur.

Rates in common carrier contracts may be published by reference to the carrier's own tariff, and must comply with Rules 6.6(f) and 6.13.

(c) Contract carriers shall establish the rates in special contracts by filing such contracts with the Commission in accordance with the terms of this General Order. No Floor Price Certification is required.

7.2 Common Carrier Rate Changes Within Zone of Reasonableness

(a) Except as provided in Rule 7.3(c) and 7.3(g), common carriers may increase rates in their tariffs in compliance with Rule 4, provided that the increased rate is not more than ten percent above the carrier's base rate. Common carrier rate filings which increase rates within the zone of reasonableness shall cite as a footnote on the tariff page the tariff page, item number, and the effective date of the base rate. (Refer to Rules 3.1 and 3.21 for definitions.)

(b) Common carriers may decrease rates in their tariffs in compliance with Rules 4 and 7.1(a). Rates below the lower end of the zone of reasonableness require a formal application to the Commission.

7.3 Rate Changes

(a) Common carrier rate changes outside the zone of reasonableness (i.e. increases greater than ten percent or cumulatively greater than ten percent over base rates for the last 12 months, or for rates lower than the floor price), and common carrier rates collectively set under Code Section 496 require a formal application to the Commission.

(b) Except as provided in Rule 7.3(a), rates filed under this rule may be filed by a common carrier or a tariff publishing agent through independent action only.

(c) If a common carrier cancels or amends any rate within 30 days of the effective date, then that rate shall not become a base rate for the purpose of

defining the upper end of the zone of reasonableness.

(d) Contract carriers may increase rates in special contracts already in effect by filing an amendment. Amendments need not be filed for automatic adjustment of contract rates provided for in the original contract.

(e) Contract carriers may decrease rates in special contracts already in effect by filing an amendment.

(f) Common carrier contracts may be amended or renewed by amendment according to Rule 6.10, except that the amended contract rates at the time the amendment becomes effective must equal or be equivalent to the carrier's own common carrier tariff rates in effect at the time the amendment is filed.

(g) Common carriers may, in lieu of formal rate application, cancel obsolete tariff rates by filing the cancellation in accordance with Rule 8.1. The rate filings canceling obsolete rates shall be accompanied by: (1) a statement that the cancelled rates have not moved traffic for at least one year, and (2) a certification under penalty of perjury that the foregoing statement is true and correct to the best of the carrier's knowledge.

7.4 Floor Price

Common carrier rates established or decreased pursuant to Rules 7.1(a) or 7.2(b) shall be accompanied by the Floor PriceCertification form attached to this General Order. The carrier shall state, under penalty of perjury, that: (1)each of the truckload rates filed is no lower than the floor price established by the Commission, and/or (2) that each less-than-truckload rate for shipments of less than 12,000 pounds is no lower than th floor price when the rate is prorated upward to a 12,000 pound load.

RULE 8—TARIFF AND CONTRACT FILINGS—PUBLIC NOTICE—EFFECTIVE DATES

8.1 Common carrier tariff and common carrier contract rates filed pursuant to Rules 6.13, 7.1(a), 7.1(b), 7.2(a), 7.2(b), 7.3(c), 7.3(f) and 7.3(g) may be effective not earlier than 10 days after listing on the Commission's Daily Transportation Calendar.

8.2 Special contract rates filed pursuant to Rules 6.14, 7.3(d) and 7.3(e) may be effective not earlier than 20 days after listing on the Commission's Daily Transportation Calendar.

RULE 9—PROTESTS AND SUSPENSION OF RATES

9.1 Protests shall be filed in accordance with the Commission's Rules of Practice and Procedure.

9.2 If a protest is filed or for other good cause, the Executive Director may, prior to the effective date of a rate filing, temporarily suspend the rate filing or any of its provisions for a period not to exceed 30 days after the requested effective date.

The Commission may: (1) deny the protest, (2) deny the requested rate filing, (3) permit the suspension to lapse, which would allow the rate filing to become effective, or (4) further suspend the rate filing and set the matter for hearing.

If the Commission further suspends the effective date of the rate filing or any of its provisions, and sets the matter for hearing, the period of suspension shall not extend more than 120 days beyond the date the rate filing would otherwise go into effect, unless the Commission extends the period of suspension for a further period not exceeding six months.

If the Commission does not act on the protest or take any further action on a rate filing suspended by the Executive Director, the rate filing will become effective the day after the suspension ends, and any protest shall be deemed denied.

9.3 Notice of any rate suspension shall be provided in the Commission's Daily Transportation Calendar.

9.4 If the Commission suspends the effective date of a filing or any of its provisions, and sets the matter for hearing, the burden of proof rests with the proponent of the filing.

RULE 10—COMPLAINTS

Commission review of any tariff or contract rate which is in effect may be initiated by filing a formal complaint in accordance with the Commission's Rules of Practice and Procedure. The burden of proof in the complaint shall be upon the complainant.

RULE 11—UNIFORM RULES

11.1 Common carrier tariffs shall contain a specific provision acknowledging that the handling of claims for loss or damage of property is governed by General Order 139 Series.

11.2 Common carrier tariffs shall contain a specific provision acknowledging that the processing, investigation, and disposition of claims for overcharge or duplicate payment are governed by General Order 148 Series.

11.3 Carriers shall expressly state in their tariffs and contracts or contract rate schedules whether collect-on-delivery (C.O.D.) services as defined in General Order 84 Series will be provided and, if C.O.D. services are provided, the tariff, contract, or contract rate schedule shall contain a complete description of and an acknowledgement that General Order 84 Series governs the C.O.D. service to be provided.

11.4 Carriers shall provide in their tariffs and contracts or contract rate schedules: (1) a complete description of any services which apply to transportation involving more than one commodity or transportation between more than two points (e.g., mixed shipments, split pickup and/or delivery, and stop-in-transit); and (2) a description of the method by which distance shall be computed (if distance is part of the calculation of the transportation charge).

11.5 Carriers shall rate shipments separately, unless otherwise provided in their tariffs, contracts, or contract rate schedules.

11.6 Carriers shall not accept for transportation hazardous materials as described in and subject to the Hazardous Materials Tariff of the American Trucking Association, unless at the time of or prior to the transportation the carrier has complied with the requirements of the Hazardous Materials Tariff, and state and federal regulations that apply to the transportation of hazardous materials.

Approved and dated February 7, 1990 to become effective March 15, 1990, at San Francisco, California.

PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA

By Wesley Franklin
Acting Executive Director

California Public Utilities Commission

RATE FILING TRANSMITTAL

Date ______________________

Carrier ______________________ T-

Address ______________________

Telephone

(   ) ____________

Enclosed are the following rate filings:
(Check all that apply)

☐ Common Carrier Tariff

Tariff Number(s) ______________________

Item Number(s) ______________________

☐ Common Carrier Contract

Contract Number ______________________

Shipper Name ______________________

☐ Special Contract

Contract Number ______________________

Shipper Name ______________________

______________________ ______________________

Date Received Date Calendared

(For CPUC use only)

E-193

1990
Interim

California Public Utilities Commission

FLOOR PRICE CERTIFICATION

Carrier ______________________

Address ______________________ T-

Telephone

( ) ____________

This form must be filed with every common carrier tariff filing. It does not apply to common carrier contracts or special contracts.

Tariff Number(s) ______________________

Item Number(s) ______________________

Check all that apply, and sign the certifications:

☐ Truckload Certification: The revenue per mile for each truckload rate submitted in this filing is not lower than 58.1 cents per mile. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Signature ________________ Date ________________

☐ Less-Than-Truckload Certification: The revenue per mile for each less-than-truckload rate in this filing for shipments of less than 12,000 lb. is not lower than 65.5 cents per mile when the rate is prorated upward to a 12,000 lb. load. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Signature ________________ Date ________________

________________________ ________________________

Date Received Date Calendared

(For CPUC use only)

APPENDIX 6

Revised Page 1

GENERAL ORDER 155-A

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

RULES GOVERNING ISSUANCE OF DOCUMENTATION AND COLLECTION OF CHARGES BY HIGHWAY CARRIERS

Adopted February 7, 1990. Effective March 15, 1990.

Decision 89-10-039, as modified by Decision 90-02-021 in I.88-08-046.

RULE 1—APPLICATION AND SCOPE

A. This General Order is issued to provide rules to govern issuance of shipping and related documents and collection of charges by highway carriers as defined in Public Utilities Code (Code) Section 3511.

B. When the provisions of this General Order are in conflict with the Commission's Rules of Practice and Procedure, the provisions of this General Order shall apply. If the provisions of a Minimum Rate Tariff or General Orders 147, 149, 150, or 151 Series conflict with this General Order, the Minimum Rate Tariff or General Orders 147, 149, 150, or 151 Series shall apply.

RULE 2—DEFINITIONS

Commission means the Public Utilities Commission of the State of California.

Debtor means person obligated to pay freight charges, whether consignor, consignee or other party.

Hazardous Materials means articles described in the Hazardous Materials Tariff ATA 111 series of the American Trucking Associations, Inc., Agent.

Highway Common Carrier means every highway common carrier as defined in Code Section 213.

Highway Contract Carrier means every highway contract carrier as defined in Code Section 3517.

Rate Exempt Transportation means transportation of commodities or transportation within the geographic areas described in the most recent Commission publication, including any revisions, entitled "Commodities and Geographic Areas Exempt from Rate Regulation." Also included is transportation exempted for specific carriers by Commission decision.

Shipment means a single consignment of one or more pieces from one consignor at one time from one origin address in one lot, moving to one consignee at one destination address, except as otherwise provided in the carrier's tariff.

Vehicle Unit Rates means rates based upon an agreement between the carrier and the shipper for specifically identified units of equipment engaged for specifically identified periods time (e.g., hourly, daily, weekly, monthly, or yearly basis).

RULE 3—DEPARTURES

Departure from the provisions of this General Order may be granted upon formal application to the Commission and after the Commission finds that such departure is reasonable and necessary. Previously authorized departures from the Commission's documentation requirements are continued in effect.

RULE 4—REQUIREMENTS FOR ISSUANCE OF DOCUMENTS

4.1 Issuance of Bill of Lading

Highway Common Carriers shall issue a Bill of Lading at the time of or prior to the receipt or pick-up of the shipment. The Bill of Lading form and its use shall conform to the provisions of the National Motor Freight Classification, filed with the Commission by National Motor Freight Traffic Association, insofar as such provisions pertain to issuance of bills of lading. Issuance and use of the Bill of Lading shall conform to the California Uniform Commercial Code, Div. 7.

4.2 Issuance of Receipt/Shipping Order

Highway Contract Carriers shall issue an appropriate receipt to each consignor, at the time of or prior to pickup, for each shipment to be transported. This receipt may be combined with a shipping order.

RULE 5—ISSUANCE OF FREIGHT BILL AND RELATED DOCUMENTS

5.1 Issuance of Freight Bill

Each carrier shall issue to the debtor a freight bill for each shipment or transaction. The freight bill may be in individual or manifest form and, as a minimum, shall show the following information:

a. Name of carrier, its current address (including ZIP code), telephone number (including area code) and Cal-T number.

b. Date of freight bill and freight bill number.

c. Date(s) of shipment or transaction.

d. Name of consignor, name of consignee, and name of debtor.

e. Point of origin and point of destination.

f. Weight of the shipment or other factor or unit of measurement upon which rates and charges are based.

g. Description of shipment or transaction in sufficient terms to permit an accurate determination of the correct rate and charge or, in the case of rate-exempt transportation, to permit an accurate determination that the shipment or transaction is exempt from rate regulation.

h. Rate and charge assessed.

i. If discounts are filed, a statement that discounts may be applicable and the carrier's phone number and address to obtain further information.

j. Other information as may be necessary to make an accurate determination of the applicable rate and charge.

5.2 Issuance of Accessorial Service Document

When a carrier provides a service not included in the transportation rates, the carrier shall issue an accessorial service document to the party who ordered the service and shall show the following information:

a. Type of accessorial service involved.

b. Time for which equipment was ordered, if any, and time of actual or constructive placement.

c. Address where the accessorial service is performed.

d. Time loading or unloading begun and completed.

e. Free time allowable.

5.3 Additional Requirements For Issuance of Documents In Connection With Transportation Subject To Vehicle Unit Rates

When transportation is performed pursuant to an agreement based on vehicle unit rates, the carrier shall provide the following information in its billing to the debtor, when applicable:

a. Type and period of transaction (e.g., hourly, daily, weekly, monthly, yearly).

b. Name and address of carrier and shipper.

c. Identification (by license number or Vehicle Identification Number) and type of equipment.

d. Effective date of transaction.

e. Base vehicle unit rate.

f. Number of hours and rate per hour.

g. Miles operated and rate per mile.

h. Number of premium pay hours and rate per hour.

i. Number of excess hours and rate per hour.

j. Number of helper hours and rate per hour.

k. Dates service performed on Saturday, Sunday, or holidays and rates for same.

l. Rate for temperature control service.

m. Explanation of any additional charges (forklifts, etc.).

RULE 6—COLLECTION OF CHARGES

A. This rule applies to transportation subject to General Order 147 Series. However, it shall apply to special contracts as defined in General Order 147 Series only when the special contracts do not specify credit terms.

B. Transportation and accessorial charges shall be collected by the carrier from the debtor prior to relinquishing possession of the property, unless the carrier has taken sufficient precautions to insure payment. Upon taking such precautions the carrier may extend credit as provided in this rule.

1. Freight bills for all transportation and accessorial charges, including vehicle unit rate freight bills, shall be presented to the debtor within 15 calendar days from the first 12 o'clock midnight following delivery of the freight. Vehicle unit rates for periods in excess of one month shall be billed within 15 days from the end of each month, corresponding to the date service commenced.

2. Carriers may extend credit to the debtor for a period of seven days, excluding Sundays and legal holidays. The credit period will begin from the first 12 o'clock midnight following presentation of the freight bill.

3. The United States mail may be used for billing and collection. The postmark will be used to record the date.

RULE 7—OTHER REQUIREMENTS

7.1 Retention of Records

Each carrier maintaining an office or place of business within the State of California shall keep therein all documentation, including any bills of lading, freight bills, accessorial service documents, weighmaster's certificates or any other written instructions, requests, agreements or documents which support the rates and charges assessed in connection with each shipment or transaction for at least three years from the date transportation was performed. Carriers which do not maintain an office or place of business within the State of California shall keep all documentation as described above for at least three years from the date transportation was performed, and shall make such documentation available to the Commission at its request in conformance with Code Section 3701.

7.2 Hazardous Materials Transportation

a. Before transportation of any hazardous materials, substances or wastes, a carrier shall insure that it has complied with documentation requirements of all governmental agencies charged with protection of the public or the environment in connection with transportation of these materials, substances, or wastes. A carrier shall note on its freight bill any circuitous routing or separation of commodities required by these.

b. Before accepting any hazardous material for transportation, a carrier shall review shipper-prepared documents for compliance with Title 40, Part 262.20, and Title 49 Parts 171.8, 12.200-172.205, Code of Federal Regulations, including any amendments or reissues. This requirement shall not be construed as relieving a shipper of any responsibility for issuance or accuracy of these documents. The carrier shall retain one copy of each document in accordance with Rule 7.1, above.

Approved and dated February 7, 1990, to become effective March 15, 1990, at San Francisco, California.

PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA

By Wesley Franklin
Acting Executive Director

(END OF APPENDIX 6)

APPENDIX 7

Revised Page 1

LIST OF ACRONYMS

A.	Application
AB	Assembly Bill
Ad Hoc	Ad Hoc Carriers Committee
ALJ	Administrative Law Judge
ASCT	Americans for Safe and Competitive Trucking
C.	Case
CHP	California Highway Patrol
CLFP	California League of Food Processors
CMA	California Manufacturers Association
Coalition	California Coalition for Trucking Deregulation
CPIL	Center for Public Interest Law
CTA	California Truckers Association
CWTB	Cal-West Tariff Bureau
D.	Commission Decision
DMV	California Department of Motor Vehicles
DOT	United States Department of Transportation
DRA	Division of Ratepayer Advocates
FTC	Federal Trade Commission

GACC	generally applicable common carrier
G.O.	General Order
HCA	Highway Carriers Association
I.	Commission Order Institution Investigation
ICC	Interstate Commerce Commission
LTL	less-than-truckload
NMFTA	National Motor Freight Traffic Association
NSSTC	National Small Shipments Traffic Conference, Inc.
OII	Commission Order Instituting Investigation
PMTB	Pacific Motor Tariff Bureau
PU	California Public Utilities Code
SB	Senate Bill
SCMD	Southern California Motor Delivery, Inc.
Teamsters	California Teamsters Public Affairs Council
TFCI	Truck Freight Cost Index
WCFTB	West Coast Freight Tariff Bureau

(END OF APPENDIX 7)

G. MITCHELL WILK, Commissioner, concurring:

After further review, I am convinced that current statutes permit the degree of contracting flexibility embodied in the revised order.

/s/ G. Mitchell Wilk
G. MITCHELL WILK,
Commissioner

February 7, 1990
San Francisco, California

APPENDIX F

CR 24, pp. 2-3

That he has been employed by the CPUC in the Transportation Division since January, 1968 and has been a supervisor in the Tariff and License Branch since May, 1985 . . .

That during 1985 and 1986 and for the first quarter of 1987, Federal Express Corporation and its subsidiary Federal Express Logistics, Inc. filed quarterly reports of gross operating revenues and remitted quarterly fees to the CPUC.

That neither Federal Express nor Logistics, Inc. has filed quarterly reports of gross operating revenues or remitted quarterly fees for the second quarter of 1987 (nor for the third quarter of 1987).

That because 1985 was its first year of operation under CPUC authority, Federal Express was not required to submit an annual report on its operations for 1985.

That due to the pendancy of the instant proceedings in United States District Court involving Federal Express and the CPUC and the imminence of a formal CPUC proceeding involving Federal Express, no letters of revocation of motor carrier authority based on non-payment of fees have been sent to Federal Express or Logistics, Inc. and such letters are on hold.

A package delivered between Oakland and L.A. could be (1) flown intrastate between the Oakland hub and the L.A. airport; (2) flown interstate from Oakland to Memphis and from Memphis to L.A.; or trucked from the Oakland hub to the L.A. airport sorting facility. Over 21 million packages moved through the Federal Express system in July, 1988. Of these, approximately 2.3 million packages were interstate packages with an origin or destination in California. Of the 21 million, 850,000 packages had an origin and destination in California in July, 1988; these packages were transported either by a combination of air and ground movements, or solely by ground.

CR 46, Ex. 3, pp. 3-4

The Oakland hub also receives packages directly by small planes, Cessnas, from smaller cities in northern California e.g. from Chico and Redding, and by truck from cities within the immediate Bay Area such as Santa Rosa, Milpitas, Hayward, San Francisco, etc. Thus, packages which arrive in Oakland for sorting may be flown in from out of state, flown in from other points in California, or brought in by local truck.

Once the outbound packages arrive at the Oakland facility, they are sorted by destination and loaded onto the most efficient mode of transportation available at that time for delivery. Packages are flown to Los Angeles on our 727 and Falcon jet aircraft, which leave Oakland for Los Angeles at 2:30 a.m., respectively. The decision about whether a particular package is sent by truck or by air from Oakland depends first how much "lift" is available, i.e. how much room there is on our airplanes. Our nightly volume of packages is large and we utilize two trucks to take the overflow volume.

The evening truck from the Oakland hub, usually one 45-foot semi-trailer, must leave Oakland no later than 8:00 p.m. to get to the Los Angeles sorting facility early enough to allow timely deliveries the next morning in Southern California. The truck holds about 40,000 pounds capacity, and is usually loaded to 75% of its volume capacity, but only 30 to 40% of its weight capacity. Going north, two trucks leave from Los Angeles early in the evening with air and ground-haul packages. These trucks take the packages that will not fit on board the Oakland bound night flight from Los Angeles. At approximately 8:00 a.m. we also send one truck from Oakland south, and one from Los Angeles north carrying mixed air haul and ground haul Standard Air (second day delivery) packages that did not make the evening air flight.

The aircraft are loaded to their maximum weight capacities. Cargo, whether on the trailer or on the airplane, is generally loaded into specially designed aircraft cargo containers which can be split in half for loading into smaller aircraft. The semi-trailer carries 4 containers, a 727 carries 11 containers, and a Falcon jet,

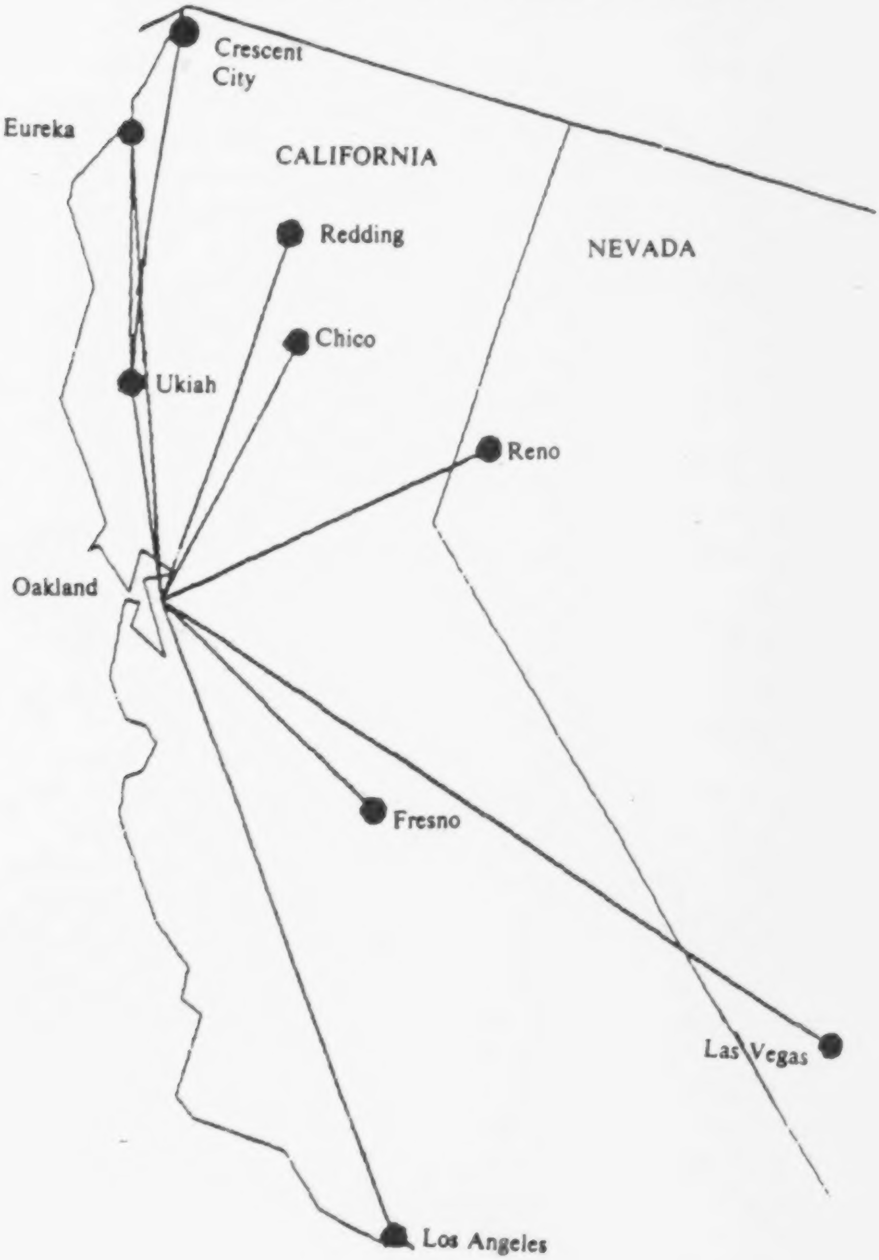
2. Cargo on smaller Cessna planes is bulk loaded on the smaller plane and thus may be transferred as a bulk load onto the trailer.

Federal Express also moves packages around the Bay and Los Angeles areas using the local airport sorting facilities when a package enters the system early enough to be sorted at the Oakland or Los Angeles airport. Rather than fly every package to Memphis, sort them there, reload them on aircraft, and return them to the airport they left from (which Federal used to do), we try to keep packages with origins and destinations near the Oakland airport or near the Los Angeles airport on the ground at the Oakland hub or Los Angeles ramp. When there is enough time to use airport sorting mechanisms before the plane leaves, we sort out those packages and reload them onto trucks for delivery the next morning.

I am familiar with our package scanning and tracking system, and the time it takes and methods used by Federal Express to track packages in its system. I know of no system which would allow us to determine, at the time a package is picked up from a customer, whether it will in fact be flown or trucked to its destination. Federal Express' system is destination oriented.

CR 46, Ex. 3, Ex. A

FEDERAL EXPRESS FEEDER AIRCRAFT



CR 46, Ex. 14, p. 2

In northern California, Federal Express operates approximately 700 Econoline vans, approximately 200 step vans, and 85 pieces of tractor-trailer equipment. In southern California Federal Express currently operates approximately 1,425 Econoline and step van vehicles and 240 pieces of tractor-trailer equipment. In northern California, Federal Express operates 17 maintenance shops to service its motor vehicles. In addition, Federal Express has 10 contract maintenance service centers operated by independent vendors to service vehicles in outlying parts of the state. In southern California, the company operates 22 maintenance shops for vehicle service.

Vehicle safety and maintenance are extremely important to Federal Express Corporation, and the company has strict maintenance procedures. In addition, the company maintenance facilities and trucks are routinely and regularly inspected by officers of the California Highway Patrol (hereinafter "CHP") to insure that Federal Express trucks are safely maintained and operated.

In northern California, Federal Express employs approximately 30 truck mechanics.

CR 54, Ex. A, p. 4

Consequently, the purchase agreement was executed by our wholly owned subsidiary, Federal Express Logistics, Inc., and a transfer application (Docket No. T-144219) was filed in March, 1984. In May, 1984, the PUC approved the transfer of authority to provide general commodities transportation within and between all counties in California by Federal Express Logistics. In August, 1984 Federal Express sought a PUC permit to operate as a highway contract carrier performing sub-haul transportation operations on behalf of Federal Express Logistics. In November, 1984 the PUC issued the requested authority to Federal Express (Docket No. T-145947).

As noted previously, Federal Express presently handles an average daily volume of 643,790 packages systemwide. 72,466 pieces (11.26% of our total volume) move outbound from California each day. 94,764 pieces (14.72% of our total volume) move

inbound to California each day. Approximately 23,756 pieces (3.69% of our total volume) originate and terminate in California each day. 37,909 pieces. (5.89% of our total volume) remain on the West Coast each day as part of our west Coast Overlay (regional distribution) system.

CR 54, Ex. A, App. A, pp. 58-59

Q. Do I understand from that that you are not presently operating any ground transportation within the state of California?

A. We are operating a lot of ground transportation in California. We are not operating any ground transportation . . . we decided that there was no way to operate under the authorization of the state of California. We are operating there under the same provisions that we are operating here.

Q. Do you in California pick up shipments say at Sacramento going to San Francisco, never moving by air?

A. Sacramento to San Francisco, the answer probably is yes. We have a . . . Oakland has a facility where we are now operating a lot of feeder aircraft and a lot of. . . . a number of 727s. There would be in California operations which would be totally by surface means. I don't know precisely where those would exist.

CR 54, Ex. F, pp. 173-74

MR. QUINN: Q. What is the commission's regulatory posture towards these exceptions that we've talked about, rebates, refunds and discounts, in your view?

MR. JUBELIRER: Objection, no foundation.

THE WITNESS: The commission at this time is very lenient in granting carriers authority to either deviate from the general orders or to grant the refund.

And in fact, presently under the rate structure we have a five percent window in the General Order 147 provision. So if the carrier presented properly, it could either raise the rates five percent or lower them five percent.

So the commission at this time is granting a lot of these very readily.

CR 54, Ex. I, p. 86

MR. QUINN: Q. Go ahead and answer the question.

A. Yes, the commission has indicated clearly that it would entertain any request by any carrier for a variation from the standard regulatory pattern in California.

Therefore, under the system that currently is in effect a carrier may come to the commission and ask for special features in its operation or its marketing system, distribution system, its rate system. And it merely needs to demonstrate the reasonableness in the values of those systems.

And in my opinion the commission would act favorably on those types of request.

CR 54, Ex. J

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution TS-668*
Transportation Division

RESOLUTION AUTHORIZING FEDERAL EXPRESS LOGISTICS, INC. TO DEPART FROM THE PROVISION OF 2(a) OF THE APPENDIX TO ITS CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, TO PUBLISH ITS TARIFF FILINGS UNDER THE RULES GOVERNING INITIAL TARIFF FILINGS, AND TO MAINTAIN CALIFORNIA INTRASTATE RATES AT THE SAME LEVEL AS ITS INTERSTATE RATES.

Federal Express Logistics, Inc. (Federal) acquired a Certificate of Public Convenience and Necessity (PCN) as a highway common carrier from Standard Concrete Materials, Inc., under authority granted by the Commission on May 18, 1984. Under the standard applicable to all recipients of transferred certificates, the transferee was required by General Order 80-A to "Amend or reissue the tariffs or adoption notices covering the certificate" (Restated in PCN, Appendix, No.2(a)). Federal requests a deviation from this requirement to enable it to make tariff filings under Commission policy applicable to holders of newly created

certificates who may file their initial tariff rates at any level at or above the level provided in the Commission's Transition Tariffs.

As justification for this request, Federal maintains that historically tariff filing requirements governing transfers protected, from unjustified rate increases, existing shippers who would continue to receive service under the transferred certificate. Assertedly, the shippers who utilize the services of transferor under the transferred authority will not be the customers of the transferee. Federal will offer an expedited, time sensitive, high value operation, calling for a tariff and rate structure entirely different and considerably higher than that maintained by the transferor. Federal further maintains that the service offered by it will be entirely new, will be used by a different segment of the shipping public and will require the initial filing of a tariff tailored to provide a rate structure compatible with the highly specialized services provided.

Federal desires to maintain its California intrastate rates at the same level as its interstate rates. It states that the segment of the shipping public to be served will be that currently served by it on an interstate basis, and that therefore, there will be no discernible effect upon either the former customers or competitors of the transferor.

Findings of Fact

1. Federal acquired its Certificate of Public Convenience and Necessity authorizing operations as a highway common carrier by transfer from Standard Concrete Materials on May 18, 1984.

2. General Order 80-A and the transferred certificate requires transferee to "Amend or reissue the tariffs or adoption notices covering the certificate".

3. Federal Proposes an expedited service which is entirely different from the general freight service provided by the transferor and will serve a different class of shippers.

4. A carrier who is granted a new certificate may file its initial tariff rates at any level at or above that of the Commission's Transition Tariffs.

5. Federal will Provide a mew service and any increase in rates over those maintained by transferor will not be borne by shippers who were formerly served under the certificate.

6. The request by Federal to maintain its initial California intrastate rates at the same level as its interstate rates is reasonable.

Conclusion of Law

The request by Federal to establish and file tariff rates as governed by the Commission's Policy for carriers filing initial tariffs should be granted.

IT IS ORDERED that:

1. Federal Express Logistics, Inc. is authorized to depart from the Commission's General Order 80-A and the provision of the Appendix, No. 2 (a), of its Certificate of Convenience and Necessity to the extent that it may file its tariffs covering operations to be conducted under the certificate it acquired from Standard Concrete Materials, Inc. as an initial tariff filing.

2. Federal Express Logistics, Inc. is authorized to initially establish its California intrastate rates at the same level as its interstate rates.

This resolution is effective today.

I certify that this resolution was adopted by the Public Utilities Commission at its regular meeting on DEC 19 1984.

The following Commissioners approved it.

JOSEPH E. BODOVITZ
Executive Director

DONALD VIAL
President

VICTOR CALVO
PRISCILLA C. GREW
WILLIAM T. BAGLEY
FREDERICK R. DUDA
Commissioners

CR 73, Attach. 2

REQUEST NO. 1: Admit that even if the CPUC allows Federal Express to estimate the number of packages that have moved solely on the ground, solely within California after transportation of the packages, the CPUC would not relieve Federal Express from complying with the rate justification requirements of PUC General Order 147-before raising or lowering its rates.

RESPONSE TO REQUEST NO. 1: While the payment of fees based on an estimated (rather than an actual) revenue figure would not of itself excuse Federal Express from other requirements, the Commission very readily entertains requests for variances from its motor carrier requirements. Thus, as was brought out in the deposition of CPUC personnel in this case, it is very likely that Federal Express could obtain relief from the Commission from rate justification requirements that were burdensome or detrimental to the Federal Express mode of operation. Proof of this inclination on the part of the CPUC can be seen in the fact that the Commission has allowed Federal Express to charge rates for intrastate motor carriage that are identical with Federal Express rates for package that move either entirely or partly by air and whether over intrastate or interstate routes. A similar arrangement is allowed to United Parcel Service.

It should be noted that the particular estimate that the CPUC would be interested in is the revenue (either actual or estimated) obtained by Federal Express based on the wholly intrastate movement of Packages entirely by motor vehicle, rather than (as stated in various requests for admission) the number of packages.

RESPONSE TO REQUEST NO. 13: As has frequently been stated in the instant case, the CPUC does not assert jurisdiction over shipments that are wholly or partially moved by air transport.

REQUEST NO. 14: Admit that the CPUC claims that on a different day, the same truck referred to in request #13 carrying some packages wholly intrastate that were never on an airplane, is subject to CPUC regulation.

RESPONSE TO REQUEST NO. 14: Yes, but see response to No. 12.

REQUEST NO. 15: Admit that the CPUC has in the past five years rejected at least one request for a rate reduction made by a common carrier.

RESPONSE TO REQUEST NO. 15: Yes.

REQUEST NO. 16: Admit that the CPUC claims that rates charged by Federal Express for intrastate ground-hauled packages are subject to CPUC cost justification general orders.

RESPONSE TO REQUEST NO. 16: While it is true that rates charged b Federal Express for intrastate ground-hauled packages are subject to CPUC cost justification requirements, the CPUC has long since allowed Federal Express to charge its nationwide air express rate for all ground intrastate movements. It bears repeating that Federal Express could readily obtain variances from such requirements if it were to show that meeting such requirements would be burdensome or detrimental to its mode of operation.

REQUEST NO. 17: Admit that the CPUC makes no claim in this case that it can regulate rates charged by Federal Express for Packages transported by aircraft from a point of origin in California to a destination in California.

RESPONSE TO REQUEST NO. 17: Yes.

REQUEST NO. 18: Admit that if Federal Express cannot cost justify a rate for transportation of a package solely on the ground within California, the CPUC will not approve the rate, even if the same rate is charged by Federal Express for transportation of the same package partly by aircraft.

RESPONSE TO REQUEST NO. 18: While it is generally true that rates require cost justification, when Federal Express was granted California intrastate authority, it was permitted to charge its interstate rates for its California intrastate, all-ground transportation. Also, as indicated elsewhere in these responses, the CPUC grants numerous variances to its motor carrier requirements. See, especially, the response to No. 1.

REQUEST NO. 19: Admit that there could be two different rates for transporting the same package from a point of origin in

California to a California destination depending on whether a package moved wholly on the ground intrastate or partially by air, if the former rate is subject to regulation by the CPUC and the other rate is free of CPUC regulation.

RESPONSE TO REQUEST NO. 19: While this theoretically is possible—in the abstract—with respect to Federal Express, the Commission some years ago granted a variance whereby Federal Express equalizes its rates regardless of whether packages move via air or ground transportation.

REQUEST NO. 20: Admit that a package trucked from Redding, California to Oakland and then flown to Los Angeles for final delivery by Federal Express is not subject to CPUC regulation.

RESPONSE TO REQUEST NO. 20: Yes.

CR 75, pp. 3-5

7. During the calendar years 1985 and 1986 and through the first quarter of 1987, plaintiff's two motor carrier entities registered with the CPUC, namely, "Federal Express Logistics, Inc." and "Federal Express Corporation" paid quarterly operating fees to the CPUC pursuant to a formula arrived at by the CPUC and plaintiff whereby an estimate of plaintiff's total revenue from wholly ground intrastate movements within California was derived.

8. Exhibits B thru E, appended hereto, represent available CPUC records about those payments. He has examined these records, is familiar with their contents, and attests that they are true and correct copies.

9. Exhibit B consists of copies of documents titled "Quarterly Report of Gross Operating Revenue," covering the quarters running from October 1, 1985 thru March 31, 1987 with respect to Federal Express Logistics, Inc. (Cal. T-144,219), the trucking entity of plaintiff's which serves as its prime (or overlying) carrier in California. These show the bulk of the Transportation Rate Fund Fees paid by plaintiff. For example, the fee paid for the Second Quarter or 1986 was $6,816. During the First Quarter of 1985—period during which plaintiff was obtaining CPUC motor

carrier authority—plaintiff paid the $12.50 minimum fee amount for its Federal Express Logistics, Inc. operation.

10. Exhibit C consists of copies of documents titled "Quarterly Report of Gross Operating Revenue," covering the quarters running from April 1, 1985 thru December 31, 1985 and April 1, 1986 thru March 31, 1987 with respect to Federal Express Corporation (Cal. T-145,947), the trucking entity of plaintiff's which serves as its subhaul (or underlying) carrier in California. These show "Federal Express Corporation; paying a $12.50 (subhaulers) fee amount during the referenced 1985 quarters and a $10 fee for each of the remaining referenced quarters. (These documents also set forth the amount of the California Uniform Business License Tax paid by plaintiff each quarter. For example, for the Second Quarter of 1986, this amount was $2,722. With respect to this business tax, the CPUC merely acts as the collection agency for the State of California and relays the collected amount to Sacramento.)

11. Exhibit D consists of computer printouts regarding fees paid by Federal Express Logistics, Inc. over the period January 1, 1985 thru March 31, 1987.

12. Exhibit E consists of computer printouts regarding fees paid by Federal Express Corporation over the period January 1, 1985 thru March 31, 1987.

13. Exhibit F consists of Federal Express work papers showing the formulation of a California intrastate revenue figure for ground operations and the formulation of an appropriate gross operating revenue ratio. In turn these figures were used to derive quarterly fee payment amounts. (Though labeled as the work papers of "Federal Express Corporation", they actually address figures that pertain to Federal Express Logistics, Inc.).

14. During these 1985-1987 periods, affiant was not aware of any dissatisfaction on the CPUC's part with this method of estimating plaintiff's quarterly fees. Likewise, he does not recall any communications from plaintiff to the CPUC expressing dissatisfaction or difficulty on plaintiff's part with such an estimated formulation of quarterly fees.

15. Also, an inspection of Exhibit D demonstrates that over most of the period that Federal Express Logistics, Inc. was paying quarterly operating fees to the CPUC pursuant to an estimated volume of California business, the level of plaintiff's company revenues was increasing. This can be seen by focusing on the numbers listed under the categories designated "ALL" and "CAL." These categories, respectively, signify Federal Express revenue from all transportation activities within the United States and revenue from all transportation activities within California. *Cf.* Exhibit B, pp. 8, 10, 12, Section titled "How To Prepare Report." The "ALL" category signifying plaintiff's total U.S. revenues shows an increase from the First Quarter of 1986 through the First Quarter of 1987 as follows: $658,710,000 (1st Quarter '86); $698,882,000 (2nd Quarter '86); $715,561,571 (3rd Quarter '86); $753,613,458 (4th Quarter '86); $773,549,262 (1st Quarter '87). [I am unable to account for the exponential increases in the "ALL" figures for the third and fourth quarters of 1985--though even these show an increase for the fourth quarter over the third quarter.] The "CAL" category signifying federal Express revenue for California business shows six straight quarter increases from the Second Quarter of 1985 through the Fourth quarter of 1986, with a small decline in the First Quarter of 1987--though total U.S. revenues for Federal Express increase in the First Quarter of 1987.

CR 75, Ex. A

Exhibit A

State of California

Public Utilities Commission
San Francisco

M E M O R A N D U M

Date : April 12, 1989

To : Oscar Chaves
Department of Finance

From : Leon D. Munoz, Director
Management Services Division

File No.:

Subject : 1989-90 Transportation Rate Fund Fees

Public Utilities Code Section 5003.1 (a) requires that Transportation Rate Fund fees fixed at less than one-third of one percent of highway carriers' gross operating revenue must be approved by the Department of Finance. The proposed fee levels for the 1989-90 fiscal year are as follows:

> One-tenth of one percent (.001) of gross operating revenue for highway carriers of property whose rates are not regulated by the Commission, and two-tenths of one percent (.002) of gross operating revenue for those highway carriers of property subject to economic regulation by the Commission.

The proposed 1989-90 fees represent no change from current year (1988-89) fee levels. Attached is a 1989-90 fund condition statement for the Transportation Rate Fund reflecting the proposed fee levels. Because this item must be calendared in April for formal approval by the Commission in May, a prompt approval in the space below is respectfully requested. Please call Mike Cooper at 597-8541 if you require additional information.

Attachment

cc: Wesley Franklin
Assistant Executive Director

APPROVED:

____

Jesse R. Huff, Director
Department of Finance

1989-90 Fund Condition

412—TRANSPORTATION RATE FUND

Estimated Reserve, June 30, 1989	$12,455,000
Revenues:	
Quarterly Fees:	
Actual 1987-88 Gross Industry Revenue Subject to Fee:	
Rate-Regulated (65%) : $5,399,587,000	
Exempt (35%) : 2,907,470,000	
Total (100%) : $8,307,057,000	
Rate-Regulated (0.002 x $5,399,587,000)	$10,799,000
Exempt (0.001 x $2,907,470,000)	2,907,000
Total, Quarterly Fees	$13,706,000
Quarterly Fees ($10 Minimum)	916,000
Penalties	295,000
Regulatory Licenses and Filing Fees	1,912,000
Sale of Documents	319,000
Income Surplus Money Investment Fund	872,000
Miscellaneous	1,000
Total, Revenues	$18,021,000
Total Resources	$30,476,000
Expenditures:	
Public Utilities Commission (1989-90 Governor's Report)	$18,347,000
Estimated 1989-90 Employee Compensation Adjustment	228,000
Total, Expenditures	$18,575,000
Estimated Reserve, June 30, 1990	$11,901,000

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No. 91-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

FEDERAL EXPRESS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether intrastate trucking transportation that is "integral to" the operation of a federally certificated national air cargo system is protected from state regulation under the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1), which applies to "any air carrier" that is federally certificated.

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BRIEF IN OPPOSITION

STATEMENT

The Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. App. § 1301 *et seq.*, preempts state regulation of federally certificated air carriers, including those that exclusively provide air cargo services. Respondent Federal Express is a covered air cargo company that uses an integrated system of planes and trucks to transport packages throughout the country. The district court held that, notwithstanding the ADA, petitioner, the California Public Utilities Commission ("CPUC"), is free to separate out and regulate Federal Express's transportation of packages that move only by truck and only in California.

The court of appeals reversed, concluding that "[t]he trucking operations of Federal Express are integral to its operation as an air carrier." Pet. App. A.5.[1]

1. The ADA provides that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier [that is federally certificated]." 49 U.S.C. App. § 1305(a)(1). Among the certificated air carriers covered by this provision are those that provide air cargo services. The ADA makes clear that, in furtherance of the "public interest," such carriers should operate an "integrated transportation system" (*id.* § 1302(a)(2)), relying on planes *and* trucks to ensure point-to-point delivery from business to business and home to home. Indeed, one of the stated goals of the ADA is to promote the "encouragement and development of an expedited all-cargo air service system." *Id.* § 1302(b)(1).

2. Federal Express is, as the court of appeals observed in this case, "exactly the kind of an expedited all-cargo service that Congress specified [in the ADA] and the kind of integrated transportation system that was federally desired." Pet. App. A-7. Federal Express operates "one of the largest airlines in the United States" (*id.* at A-2); it also uses trucks to move packages to and from its facilities and airports, thereby enabling the company to provide door-to-door delivery throughout the country by 10:30 a.m. the day following pick-up. The entire system is built around the use of a "hub and spoke" airplane operation: Federal Express trucks pick up packages at offices, homes, and drop boxes nationwide and transport them to the company's airport facilities, where they generally are flown either to Federal Express's national sorting hub or to one of its two regional hubs; the packages are then usually again transported by

[1] Respondent Federal Express has no parent corporation or non-wholly owned subsidiaries. *See* Sup. Ct. R. 29.1.

plane to airports throughout the country, where they are placed on trucks for delivery to their final destination.

Because Federal Express's air cargo "system operates as an integrated whole, a delay of even one half-hour at an airport may affect thousands of packages." *Id.* at A-3. As a result, scheduling decisions necessarily require maximum flexibility so that Federal Express is able to deal with a large variety of day-to-day exigencies that can have system-wide effects on a regional, if not national, basis. In California, for example, a package going from a business office in San Francisco to one in Los Angeles is trucked to the Federal Express regional hub at the airport in Oakland. From there, the package may move to Los Angeles in one of three ways: (1) it may be flown there directly; (2) it may be flown to Memphis—Federal Express's main hub—and then to Los Angeles; or (3) it may be trucked to the Los Angeles airport. Once a package arrives at the airport in Los Angeles, it is then trucked to its point of delivery. When Federal Express picks up any such package, it does not know by which of these three routes it will be transported. That decision is made at the sorting hub in Oakland and "depends on air traffic, control delays, weather, aircraft availability, and the volume of packages in the entire system." *Id.* at A-3. Consequently, a Federal Express customer in San Francisco uses the same air bill, is charged the same price, and receives the same money-back guarantee of a 10:30 a.m. delivery, regardless of how its package is actually moved.

At the time that this case was heard in the district court, Federal Express had been transporting an average of approximately 650,000 packages nationwide on a daily basis, the vast majority of which were delivered, sorted, and re-routed through the Memphis hub. Of that number, just over 11% moved out of California and almost 15% moved into California. About 3.7% of Federal Express's total number of packages both originated and terminated

in California, and a substantial portion of those packages were transported by a combination of plane and truck. *Id.* at A-2; F-5-6.

3. Federal Express initiated this litigation after petitioner insisted that the company file tariffs and provide it with information concerning the exact number of California packages that travel solely by truck. Federal Express responded that, given the nature of its operations, including its necessary reliance on flexible and changing scheduling decisions, that information was unobtainable. The CPUC nevertheless persisted in its demands, claiming that it could properly assert regulatory jurisdiction with respect to Federal Express's handling of these particular packages. The CPUC's powers are extremely broad, covering, *inter alia*, rates, capitalization, credit policies, insurance, permissible geographic areas of operation, and tariff requirements. *Id.* at D-6-9. Federal Express argued that the application of this regulatory scheme to the trucking portion of its integrated air cargo system was barred by the ADA.[2]

The district court, on summary judgment, rejected Federal Express's claim. It first ruled that express preemption was unavailable because Federal Express had not shown that its "intrastate trucking operations are singularly *airline* services." Pet. App. B-6 (citing *Air Transp. Ass'n v. Public Utils. Comm'n*, 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988)). The district court further held that implied and conflict preemption were inapplicable here because Federal Express "has pre-

[2] Federal Express also challenged the application of the CPUC's regulations on Commerce Clause grounds, claiming that these intrastate regulations would directly and adversely affect Federal Express's national operations and that, therefore, the CPUC's regulations would impermissibly burden interstate commerce. The district court rejected this claim (Pet. App. B-9), but the court of appeals found it unnecessary to reach the claim (*id.* at A-6-7) in light of the preemption ruling under the ADA. The Commerce Clause issue, therefore, is not before this Court.

sented no evidence to demonstrate that Congress viewed Federal Express as an 'integrated air-ground system' whose operations should be considered under the single rubric of air carrier." Pet. App. B-9.

The court of appeals reversed. Focusing on the ADA's language and its purposes, the court held that "the [statute] as it applies in this case preempts action by the state that regulates the rates and terms of service offered by [Federal Express]." *Id.* at A-5. This holding rested primarily on the court's finding, based on the "undisputed" facts (*id.* at A-2-3), that "[t]he trucking operations of Federal Express are integral to its operations as an air carrier. The trucking operations are not some separate business venture; they are part and parcel of the air delivery system." *Id.* at A-5. The court elaborated: "Every [Federal Express] truck carries packages that are in interstate commerce by air. The use of the trucks depends on the conditions of air delivery. The timing of the trucks is meshed with the schedules of the planes." *Id.* at A-5-6. The court of appeals also emphasized, as noted, that "Federal Express is exactly the kind of an expedited all-cargo service" that Congress had in mind when it enacted 49 U.S.C. § 1302(b). For these reasons, the court concluded, "[t]he [C]PUC's regulation of rates, of discounts and promotional pricing, of claims, of overcharges, of bills of lading and freight bills, and its imposition of fees enters the zone that Congress has forbidden the states to enter." Pet. App. A-6.[3]

Judge Singleton, sitting by designation, dissented. In his view, the preemptive effect of section 1305(a)(1) is limited "to the provision of air transportation." *Id.* at A-8. Starting from that premise, the dissent then con-

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[3] The Ninth Circuit further stated that its decision barred the application only of the CPUC's "economic" regulations and "that the general traffic laws of California and its safety requirements for trucks on its highways apply to Federal Express." Pet. App. A-5.

cluded that the operations of an integrated national air cargo service system can be, and should be, divided into those which "are exempt and [those] which are not" (*id.* at A-8), with the controlling factor being simply whether any particular package "see[s] the inside of an airplane." *Id.* at A-8 n.3.

REASONS FOR DENYING THE PETITION

This case presents a narrow issue, correctly resolved by the court of appeals below. The Ninth Circuit, finding that respondent's trucking activity is "integral to its operations as an air carrier" (Pet. App. A-5), properly concluded that state regulation of that activity was regulation of the "rates, routes, or services of [an] air carrier" (49 U.S.C. App. § 1305(a)(1)), and thus preempted. No other federal court has ever ruled on this issue, much less decided it in a contrary manner, and petitioner's arguments notwithstanding, no dire consequences will flow from the decision below. Review by this Court is not warranted.

1. The issue presented to, and decided by, the Ninth Circuit was straightforward and precise: whether the CPUC could impose economic regulation on Federal Express's intrastate use of trucks to transport packages in the company's nationally integrated air cargo system. Given the nature of the services provided by Federal Express, the court of appeals rightly decided that the regulations in question fell within the federal prohibition against state regulation of the "rates, routes, or services of any air carrier." 49 U.S.C. App. § 1305(a)(1). This conclusion follows naturally from both the language and the purposes of the Act.

To begin with, the preemptive language of section 1305(a)(1) applies to state efforts to regulate the "rates, routes, or services of *any* air carrier" (emphasis added). Federal Express is indisputably an air carrier within the meaning of that provision; and its use of

trucks, far from being separate and distinct from its operation as an "air carrier," are (in the words of the court of appeals) "integral to" and "part and parcel of" that air carrier operation. Once that is understood, it follows that the language of section 1305 bars state regulation of all of Federal Express's "rates, routes or services," and not just regulation of its aircraft operations. As the Ninth Circuit put it, by asserting regulatory power over Federal Express's intrastate use of trucks, the CPUC seeks to "regulate[] the rates and terms of service offered by an air carrier." Pet. App. A-5.

The contrary view of the statute offered by petitioner effectively seeks to insert the word "airplane" before the words "rates, routes or services," or to change the phrase "any air carrier" to "any air carrier's provision of transportation by air." But if Congress wanted to distinguish regulation of one part of an integrated air cargo system from regulation of another part—permitting the one but not the other—it could easily have included that distinction in the statute. *Compare* 49 U.S.C. App. §§ 1305(a)(2); 1305(b)(1) (establishing explicit statutory exceptions to the preemption coverage of § 1305(a)(1)). The ADA simply does not contain the limiting words that petitioner seeks to insert. Not surprisingly, therefore, petitioner makes no effort to rely on the actual words of section 1305. *See* Pet. 7.[4]

The policies behind the ADA, far from providing any support to petitioner, fully confirm the correctness of the Ninth Circuit's holding. In particular, section 1302(b) of the statute, which petitioner fails to mention, expressly embodies Congress's policy of encouraging the development

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[4] Petitioner's proposed language is very different, of course, from the statutory language referring to "any air carrier having authority under subchapter IV of this chapter to provide air transportation," which simply means a federally certificated air carrier. 49 U.S.C. App. § 1305(a)(1).

of an "expedited all-cargo air service *system*" (§ 1302 (b)(1) (emphasis added)) to further three important national goals—the needs of shippers, national commerce, and national defense. Unlike air passenger transportation, moreover, Congress expected that such an all-cargo system would be "an integrated transportation system" (§ 1302(b)(2)), one that would necessarily require the use of trucks to supplement an elaborate air network. In view of ADA's strong preference for such air cargo systems, it seems inconceivable that Congress would nevertheless intend preemption to apply or not apply depending on how each individual package actually moves, rather than on the operational nature of the entire "integrated transportation system." *Ibid.*[5]

On the contrary, the package-by-package preemption rule urged by petitioner would plainly undermine the efficiency and effectiveness of a national air cargo system. Thus, under petitioner's approach, Federal Express would be forced into one of two options: it could revamp its entire California system in order to isolate some portion of its intrastate transportation, advising those particular customers that they—unlike their neighbors—would have to pay different rates and be subject to different terms and conditions; or it could use an airplane as part of the delivery of every package in California, even though that would disrupt the efficiency and effectiveness of its national operations. It is wholly illogical to think that Congress, which broadly preempted state regulation in an effort to encourage efficient national air cargo systems,

[5] The express inclusion in section 1302(b) of the ADA of these policies favoring air cargo systems makes irrelevant the fact that the "legislative history of § 1305(a)(1) is bereft of any reference to ground transportation." Pet. 10 (citing reports). Indeed, that silence notwithstanding, even petitioner recognizes that section 1305 must apply to the large amount of "ground transportation" that takes place when a particular package also travels by air. *Id.* at 9-10.

nevertheless intended for state regulation to force such inefficiencies.[6]

Ignoring these fundamental points, petitioner chooses instead to challenge the decision below by mischaracterizing it. Thus, according to petitioner, the decision would protect "activities having little or no relationship to air transportation" (Pet. 6), so that a State would be powerless to regulate Federal Express even if it used its trucks to operate a "florist or pizza business in San Francisco." *Id.* at 6 n.4 (quoting Pet. App. A-10). The opinion, however, could not be more clearly to the contrary. As the court of appeals explained, the reason that the CPUC's regulation of Federal Express is preempted here is that Federal Express's trucking activities are "integral to" the operation of its national air cargo system; on the other hand, such preemption would *not* be available if Federal Express were to use its trucks for "some separate business venture." Pet. App. A-5.

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[6] Petitioner also suggests that its reading of section 1305 is bolstered by several provisions of the Motor Carrier Act of 1980, 49 U.S.C. § 10101 *et seq.*—in particular, the provision leaving to the states the power to regulate intrastate motor carriage. Pet. 10. Those general provisions in a statute addressed to federal motor carrier regulation, however, cannot be read to displace the specific preemptive provision of a separate statute, the ADA, which was indisputably intended to apply to air cargo systems. By the same token, petitioner's reliance (*id.* at 10-11) on the sections of the Motor Carrier Act that bar the *Interstate Commerce Commission* from regulating transportation by a combination of air and motor vehicle (49 U.S.C. § 10526(a)(8)(B)), or by a motor vehicle when it is used in lieu of an airplane during emergencies (*id.* § 10526(a)(8)(C)), is misplaced; those sections are not an affirmative indication that Congress intended the *States* to be able to regulate every other form of truck transportation regardless of context. Rather, Congress's intent on that broad question must be discerned by examining other statutes—such as the ADA—that expressly tie the use of trucks to other federal concerns—such as the promotion of an integrated air cargo system.

In sum, the "integral-to" standard adopted by the court of appeals for determining whether the use of trucks by an air cargo system comes within section 1305(a)(1) is both sensibly and carefully drawn; indeed, it literally echoes Congress's expressed desire to foster the development of "integrated transportation system[s]" to provide national air cargo service. 49 U.S.C. App. § 1302(b)(2). Such a standard thus correctly reads the ADA's preemption provision to go as far as, but no further than, that which is necessary to protect the full range of activities by an air cargo system operating as Congress contemplated that it would.

2. Petitioner suggests both that this case raises broad issues concerning "the preemptive reach of § 1305(a)(1) [of the ADA]" (Pet. 6), and that it resolves those issues in a manner which is inconsistent with the rulings of other courts of appeals (*id.* at 8-9 (citing cases)). Petitioner is wrong on both counts. The decision below, read without improper exaggeration, is neither sweeping in scope nor in conflict with the decision of any other court.

In the first place, the decision in this case simply does not establish a broad, general rule regarding the scope of preemption under the ADA. On the contrary, the court of appeals limited its ruling to a narrow, fact-bound question: whether a particular air cargo carrier's use of trucks was sufficiently integrated with its overall air delivery system to warrant preemption.[7] That ruling

[7] The truly limited nature of the Ninth Circuit's ruling is highlighted by the fact that the parties here agree on most of the possible questions relating to the ADA's preemption of activities by air cargo systems. Thus, petitioner acknowledges that it may not apply its trucking regulations to the overwhelming majority of Federal Express's trucking activities—*i.e.*, those involving packages that also travel by air. On the other hand, Federal Express recognizes that if it uses its trucks for "some separate business venture" (Pet. App. A-5), that activity would not be preempted. In addition, Federal Express also concedes that California may properly apply

does not purport to, and does not in fact, resolve any other preemption questions under the ADA—such as those presented by the two cases in which petitions for certiorari are currently pending in this Court: *i.e.*, whether the States can regulate deceptive airline price advertisements (*Trans World Airlines v. Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 111 S. Ct. 307 (1990), *reaff'd after remand*, No. 70-8387 (5th Cir unpublished, Jan. 18, 1991), *cert. pending*, Nos. 90-1604 and 90-1606); and whether the States can impose state law remedies for an airline's failure to provide carriage as a result of overbooking (*West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990), *cert. pending*, Nos. 91-505 and 91-734). Indeed, even petitioner notes that the *Morales* case raises a "preemption question . . . *distinct from that presented here*." Pet. 6 n.5 (emphasis added).

Just as the decision below establishes no broad principle, it also cannot fairly be read to be in conflict with any other decision, because no other court has ever ruled on any preemption issue regarding the use of trucks by a national air cargo carrier.[8] The cases that petitioner relies on to suggest otherwise are simply inapposite. (Curiously, having said that the issue in *Morales* was "distinct from that presented here" (*ibid.*), petitioner nevertheless goes on to cite that case as being at odds with this one (Pet. 9)). Petitioner's cases, in fact, involve an

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its "general traffic laws" and "its safety requirements for trucks on its highways" to all Federal Express trucks, even if they carry *only* packages that also move by air.

[8] In 1986, the Tennessee Public Service Commission issued an order requiring Federal Express to apply for a certificate of convenience and necessity to operate as an intrastate motor carrier. Federal Express challenged that order in federal court proceedings that were ultimately dismissed on abstention grounds. *Federal Express Corp. v. Tennessee Public Service Comm'n*, 925 F.2d 962 (6th Cir.), *cert. denied*, 112 S. Ct. 59 (1991). The merits of Federal Express's claims, including its argument under the ADA, were never addressed by any court.

entirely different issue of statutory interpretation under section 1305(a)(1). In this case, the court of appeals interpreted the words "rates, routes or services of any air carrier," holding that those words apply to all of the "rates, routes or services" of Federal Express's integrated air-trucking operation, and not just the "rates, routes or services" for those packages that travel by air. In the cases cited by petitioner, on the other hand, there was no dispute about the meaning of the term "rates, routes or services"; rather, the statutory language at issue in those cases was the term "relating to"—a point that petitioner itself makes in each of the parentheticals describing these cases (*see* Pet. 8-9)—and the dispute was over how narrowly or broadly to read that language. But even under the narrowest possible reading of the words "relating to," petitioner's effort to regulate Federal Express's rates and services directly does not merely "relate to" such rates and services, but actually seeks to dictate them.[9]

3. Finally, the Ninth Circuit's decision will not lead to the dire consequences that petitioner predicts. Most

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[9] Petitioner's reliance (Pet. 12) on *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), is also misplaced. In that case, Congress had treated "environmental regulation and land use planning as generally distinguishable" (*id.* at 588), barring state regulation of the latter, but not the former. Given that distinction, this Court ruled that, because of the State's "identification of a possible set of [regulatory] conditions not preempted by federal law" (*id.* at 589), it would be inappropriate to insist that all state regulation was preempted on its face.

In this case, by contrast, the CPUC does not deny that it seeks to regulate Federal Express's "rates . . . or services," which it is barred from doing by the ADA if, as the court below found, those are rates and services of an air carrier. Thus, while petitioner asserts that "Federal Express will be accorded . . . variances from any economic regulatory requirements [of the CPUC] which unduly burden its operations" (Pet. 11 (citations omitted)), that assertion is besides the point here, because *all* regulation—not just some—of Federal Express's rates and services is statutorily preempted.

obviously, petitioner is incorrect in arguing that the court of appeals' decision "threatens the ability of the states to protect public safety." Pet. 7; *see also id.* at 12, 13. The opinion below flatly says otherwise, making clear that "it is uncontested in this case that the general traffic laws of California and its safety requirements for trucks on its highways apply to Federal Express" (Pet. App. A-5) and concluding that this concession by Federal Express reflects a correct view of the law. *See id.* at A-6 (distinguishing safety from economic regulation); and *id.* at A-7 ("Congress has freed [Federal Express] from the constrictive grasp of *economic* regulation by the states") (emphasis added). It is simply not possible, therefore, to say that the State of California will be unable "to protect public safety."

Petitioner also raises the spectre that the decision will have an "anticompetitive impact" by "undermin[ing] the regulatory goals of California's pro-competitive program." Pet. 13. As an initial matter, that is a curious argument to make in the context of the ADA. After all, Congress decided to exempt federally certificated all-cargo air systems from state regulation precisely because it wanted "*competitive market forces* to determine the extent, variety, quality, and price of such services." 49 U.S.C. App. § 1302(b)(2) (emphasis added); *see id.* at § 1302(a)(4). Congress, in other words, apparently disagreed with petitioner's view that competition for integrated air cargo services is better promoted by regulation than by the free market.[10]

[10] The wisdom of Congress's view, while not at issue here, is nonetheless borne out by the facts of this case. Thus, the CPUC never explains why its regulations, rather than the marketplace, are likely to be more procompetitive. In fact, precisely the opposite would appear to be true. If Federal Express's current service is particularly appealing to consumers—*e.g.*, its rates are low—then state regulatory efforts will *harm* competition by making this desirable option unavailable; and if Federal Express's service is rela-

Petitiioner's specific concerns about unfair competition are similarly off the mark. Thus, petitioner complains that, absent its regulatory authority, Federal Express will be able to engage in "discriminatory practices" and "give preferences to some shippers and not to others." Pet. 13. But the ADA expressly states that air cargo systems like Federal Express must provide their services "*without* unjust discriminations, undue preferences or advantages, unfair or deceptive practices, or predatory pricing." 49 U.S.C. App. § 1302(b)(3) (emphasis added). Petitioner cannot legitimately be heard to complain that Congress assigned the responsibility for administering those requirements to the United States Department of Transportation, with its *national* perspective on federally certificated air cargo systems.

The CPUC's argument that the Ninth Circuit's decision "invite[s] years of burdensome litigation" (Pet. 7; *see also id.* 14) is equally unpersuasive. As noted, the issue presented in this case has not generated litigation in the past; and, in the unlikely event that it should do so in the future, other courts will then have an opportunity to consider the issue—a process that is generally a prerequisite, for sound prudential reasons, to this Court's consideration of an issue. Nor does the decision below fail to provide a "clear standard for ascertaining when preempted economic regulation becomes permitted noneconomic [*i.e.*, safety] regulation." Pet. 14. The answer to that question is patently clear: when the CPUC seeks to regulate the safety features of Federal Express's trucks and the safety standards applicable to its drivers, the CPUC's regulatory efforts are permissible. But when, as here, the CPUC seeks to regulate the "rates and terms of service" (Pet. App. A-5) of an integrated air cargo system like Federal Express, its efforts are preempted.

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tively unattractive—*e.g.*, the rates are too high—market forces will lead consumers to select other delivery companies regardless of whether Federal Express is regulated by the CPUC.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 22, 1991

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No. 91-502

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

FEDERAL EXPRESS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF FORTY-SIX STATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1), which prohibits state regulation "relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation," preempts the State of California from engaging in the economic regulation of Federal Express Corporation's purely intrastate transportation of packages that are transported exclusively by truck and at no time by air.

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No. 91-502

IN THE SUPREME COURT
OF THE
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October Term, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

FEDERAL EXPRESS CORPORATION,
Respondent.

BRIEF *AMICUS CURIAE* OF FORTY-SIX STATES IN SUPPORT OF PETITIONERS

Amici curiae, forty-six of the fifty States of the Union, hereby submit their brief *amicus curiae* urging the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and to set the cause for briefing and oral argument.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are forty-six States, as represented by their respective Attorneys General. *Amici* have a vital interest in legal issues that affect the powers and responsibilities of state governments.

This case presents the question of whether the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1), preempts a state from regulating the purely intrastate activities of motor carriers on its public streets and highways where the motor carrier involved happens to hold a certificate as an "air carrier" under the Federal Aviation Act, 49 U.S.C. App. § 1371.

Constitutional and statutory issues affecting the power of state governments to regulate in the public interest are of great importance to *amici*. The question in this case is particularly important because the decision below seriously impairs the ability of the states to protect consumers and to assure the safety of their citizens on the public highways. If the State of California is preempted from regulating the purely intrastate trucking activities of a company simply because that company holds an air carrier certificate, then it is difficult to imagine what state regulation of such a company is not preempted. *Amici* consider it of utmost importance that the Court grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and set the cause for briefing and argument.[1]

SUMMARY OF ARGUMENT

The Ninth Circuit's decision is extremely disruptive of state motor carrier regulatory programs across the country and threatens to erode the power of the states to protect the public safety of their citizens on the highways. State regulation of the purely intrastate, purely ground motor carrier operations of an "air carrier" such as Federal Express Corporation is not regulation "relating to rates, routes, or services of any air carrier having authority . . . to provide air

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[1] The States of Georgia and Maine do not join in Part V of this brief.

transportation." Such regulation has little or nothing to do with an air carrier's provision of air transportation. The Ninth Circuit's decision is no less than judicial legislation, unsupported by the words or legislative history of the statute. The issue presented has arisen in other jurisdictions and is one of national importance. Indeed, the Ninth Circuit's decision appears to create an irreconcileable conflict between decisions of the Ninth Circuit and the State of Tennessee. The Court should grant certiorari with full briefing and oral argument both in the instant case and in pending cases involving the authority of states to enforce state deceptive advertising laws against air carriers.

ARGUMENT

I

THE NINTH CIRCUIT'S DECISION IS EXTREMELY DISRUPTIVE OF STATE MOTOR CARRIER REGULATORY PROGRAMS ACROSS THE COUNTRY

The Ninth Circuit's decision in *Federal Express Corp. v. Pub. Util. Comm'n of California,* 936 F.2d 1075 (9th Cir. 1991), Al,[2] will cause serious disruption in the intrastate motor carrier regulatory programs of the fifty states.

Clearly, significant differences exist in the economic regulatory programs of the fifty states. Many, such as California, utilize deregulatory approaches which seek to harness the benefits of competitive market forces, subject to appropriate safeguards designed to protect consumers from anticompetitive and discriminatory practices. E10. Others are closer to

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[2] As herein used, page references beginning with letters refer to pagination in the appendix to the petition for certiorari.

traditional cost-of-service regulation. Each is a regulatory program which, in the view of the state adopting that program, serves the public interest.[3] The variability among state regulatory programs highlights the differences among states and the difficulty in formulating a single regulatory system for intrastate motor carriage. This case, however, raises the question of the *authority* of a state to adopt and enforce a program consistent with its view of the public interest.

The lower court reaches its conclusion despite express Congressional authorization of state regulation of intrastate motor carriers. 49 U.S.C. § 10521(b). Thus, the Ninth Circuit unnecessarily creates a conflict between the Airline Deregulation Act and the Interstate Commerce Act, impliedly repealing provisions of the latter.

In addition, the Ninth Circuit's decision invalidates by implication some, but apparently not all, of the provisions of regulatory programs in each of the fifty states. It suggests, without any basis in the words of the statute, that economic regulatory programs are preempted while non-economic programs are not. A5. Nevertheless, the Ninth Circuit defines economic regulation as anything that "affect[s] the price" of the service offered. A6. In this way, considerable uncertainty is created as to which provisions in a particular state's regulatory scheme remain intact. The authority of states to regulate purely intrastate activities on their public highways should not rest on such an infirm foundation.

The Ninth Circuit's rationale raises more questions than it answers. Under that reasoning, may

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[3] A handful of states have deregulated the economic activites of motor carriers entirely but continue to regulate motor carrier safety.

a state prohibit rate discrimination by highway carriers engaging in purely intrastate trucking operations, when such carriers hold air carrier certificates? May it require such carriers to file tariffs available for public inspection or to set rates within a zone of reasonableness established by the state? May it prohibit predatory pricing by such motor carriers? May it specify minimum insurance requirements for such highway carriers? May it specify worker's compensation requirements for such carriers? May it require the drivers of such motor carriers to adhere to driving requirements designed to meet problems recognized to exist in the industry? May it specify safety inspection requirements and procedures if those regulations affect the price of the motor carrier's truck-only services? May it require an intrastate motor carrier that also happens to hold an air carrier certificate to obtain operating authority from the state before conducting its intrastate trucking business? May it revoke operating authority for non-compliance with state laws and regulations? And may a state charge fees to underwrite the cost of its regulatory program? The Ninth Circuit's decision expressly provides that a state may not impose fees on such carriers, A6, and strongly implies that a state may do none of the other things. Such an intrusion into state regulation of the intrastate activities of trucking companies cannot be what Congress intended when it attempted to deregulate the provision of air transportation by air carriers in the Airline Deregulation Act of 1978.

Unless corrected by this Court on certiorari, the Ninth Circuit's decision will spawn an epidemic of unnecessary litigation across the country.

II

THE NINTH CIRCUIT'S DECISION THREATENS THE ABILITY OF THE STATES TO PROTECT PUBLIC SAFETY

Despite the Ninth Circuit's assertion that "it is uncontested in this case that the general traffic laws of California and its safety requirements for trucks on its highways apply to Federal Express," A5, that Court's rationale raises numerous questions as to whether the Airline Deregulation Act preempts state safety regulation of motor carriers who also are air carriers. Economic regulation and safety regulation in most states are closely intertwined. *See* E66, E75-77. State economic regulatory commissions commonly assume an important role in setting truck safety standards as well as an important supporting role to state highway patrols in safety enforcement. Indeed, in most states, the state commission's revocation or withdrawal of a highway carrier's operating authority is the ultimate sanction for unsafe carriers. C7-9, D7, E76-7. Nevertheless, the Ninth Circuit's decision raises considerable doubt as to whether a state regulatory commission may (1) grant operating authority to a motor carrier that is also an air carrier, (2) specify carrier and driver safety requirements that affect the carrier's costs, (3) revoke such a carrier's operating authority for non-compliance with safety requirements, and (4) impose fees to underwrite its safety program. *See generally* the District Court's opinion, *Federal Express Corp. v. Pub. Util. Comm'n of California,* 723 F.Supp. 1379 (N.D.Cal. 1989); C7-9. The uncertainty created by the Ninth Circuit's rationale is compounded by its definition of "economic" regulation -- i.e., it concludes that Federal Express is immune from any state regulation that "affects the price" of its service. A6. Under this definition, virtually any state regulation

of the activities of an air carrier constitutes economic regulation subject to federal preemption. In light of the Ninth Circuit's reasoning, the Court should grant certiorari to clarify that § 1305(a)(1) in no way impinges on the authority of the states to regulate trucking safety.

The Ninth Circuit's ruling makes it more difficult for the states to ensure public safety on their highways at a time when the need for strictly-enforced state trucking safety programs is at its greatest. In an economically deregulated environment, motor carriers are subject to strong incentives to cut costs. States need to scrutinize carrier practices and enforce state-imposed safety requirements even more closely. Indeed, the Congressional Office of Technology Assessment has concluded that one of two top priorities was "improving State enforcement capabilities and regulatory uniformity." U.S. Congress, Office of Technology Assessment, *Gearing Up for Safety: Motor Carrier Safety in a Competitive Environment,* OTA-SET-382 (Washington, D.C: U.S. Gov't Print'g Ofc., Sept., 1988), at p. 20. The OTA study also concluded that "State audit programs are indispensable additions to Federal enforcement efforts." *Id.*

The Court should grant certiorari to prevent an undue erosion of the states' ability to protect the safety of their citizens on the highways.

III

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT A STATE'S REGULATION OF AN INTRASTATE MOTOR CARRIER THAT HOLDS AN AIR CARRIER CERTIFICATE DOES NOT CONSTITUTE REGULATION "RELATING TO RATES, ROUTES, AND SERVICES OF ANY AIR CARRIER"

The question presented in this case is whether California's regulation of Federal Express Corporation's purely intrastate trucking activities -- its intrastate transportation by truck of packages that never see the interior of an airplane -- constitutes regulation "relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation." 49 U.S.C. App. § 1305(a)(1).

Federal Express argued below that this case should be resolved by equating the statutory words "relating to" with the Court's broad construction of the words "relate to" in Section 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a). *See Federal Express Corp. v. Pub. Util. Comm'n of California,* 716 F.Supp. 1299, 1303 (N.D.Cal. 1989). However, this Court has made it clear that the meaning of those words as employed in ERISA cannot casually be translated to other contexts.

In *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 47 (1987), *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, 739 (1985), and *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 96-100 (1983), this Court did conclude that the words "relate to" in ERISA had an "expansive sweep." *Dedeaux, supra,* 481 U.S. at 47. However, it rested its determination that the words should be interpreted "in their broad sense," [*Shaw,*

supra, 463 U.S. at 98], on 1) the plain language of § 514(a), 2) the structure of ERISA, and 3) ERISA's legislative history. *Id.* at 100. Under the Court's analysis, it is clear that the meaning of the words "relate to" in ERISA is *sui generis. See FMC Corp v. Holliday,* 111 S.Ct. 403 (1990). As noted by the District Court herein,

> [T]his reading of ERISA preemption should not be taken as a canon of general statutory interpretation. The legislative history of ERISA indicates that Congress specifically intended a broad reading of preemption in that context. *Pilot Life,* 481 U.S. at 45-46, 107 S.Ct. at 1551-1552 (citations omitted). Plaintiff cites no comparable legislative history concerning section 1305(a). It is true, however, that the legislative framework of section 1305(a), the Airline Deregulation Act of 1978, was aimed at creating "comprehensive legislation" to supply "a gradual and phased transition to a deregulated system." *Hughes Air Corp. v. Public Utilities Comm'n,* 644 F.2d 1334, 1337 (9th Cir. 1981) (citation omitted).
>
> Even assuming arguendo that the phrase "relating to" should be read expansively, plaintiff's position is problematic. The court has found no cases in which the phrase "relating to" in this section has been applied to regularly conducted ground transportation. *Compare, e.g., Anderson v. USAir, Inc..* 818 F.2d 49, 57 (D.C. Cir. 1987) (state law requirement of courteous service on airplane preempted by section 1305(a)). Under the interpreta-

> tion urged by Federal Express, virtually any air carrier-owned or operated service would escape state regulation if it established the slightest nexus between its various activities. The court declines to strain such a reading from section 1305(a).

716 F.Supp. at 1303~~; B6-7~~ (footnotes omitted).

The District Court's balanced and thoughtful analysis is correct. The conclusion that state regulation of intrastate motor carrier operations having nothing to do with the provision of air transportation is regulation "relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation" stretches the statute well beyond the clear and manifest intent of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). If the Ninth Circuit's reading of the statute were correct, the states would be preempted from regulating "rates, routes, and services" having nothing to do with the provision of air transportation. Thus, the statutory reference to air carriers "having authority . . . to provide air transportation" would be surplusage. Such a reading of the statute is inappropriate. *Colautti v. Franklin,* 439 U.S. 379, 392 (1979); *United States v. Menasche,* 348 U.S. 528, 538-39 (1955).

As above noted, the statutory reference to the "rates, routes, and services of any air carrier having authority . . . to provide air transportation" is most plausibly read to refer to the carrier's "rates, routes, and services" in providing air transportation, i.e., to its "rates, routes, and services" as an air carrier. A contrary reading of the statute infers a Congressional intent to immunize from state regulation all activities of air carriers, whether they involve the provision of ground transportation, banking or insurance services, or anything else. This was not the purpose of the

Airline Deregulation Act. *Hughes Air Corp. v. Pub. Util. Comm'n of California,* 644 F.2d 1334, 1336-7 (9th Cir. 1981).

In this case, Federal Express has failed to meet its heavy burden of demonstrating that preemption of the state's exercise of its traditional police powers over purely intrastate, truck-only motor carrier operations was "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230. The Ninth Circuit's conclusion that "Congress has freed [Federal Express] from the constrictive grasp of economic regulation by the states [with respect to its activities having nothing to do with the provision of air transportation]" is no less than judicial legislation. *See, e.g.,* 49 U.S.C. § 10521(b). If that were the result Congress intended, Congress could have said so in clear and unmistakeable language. Congress did not do so.

The Court should grant certiorari to clarify that a company's status as an "air carrier" does not give it license to violate, with impunity, state regulations having no more than a miniscule relationship to the provision of air transportation.

IV

THE NINTH CIRCUIT'S DECISION CREATES AN IRRECONCILEABLE CONFLICT BETWEEN THE NINTH CIRCUIT AND THE STATE OF TENNESSEE AND INVOLVES AN ISSUE OF NATIONAL IMPORTANCE

California's dispute with Federal Express raises an issue of national importance -- an issue which has arisen not only in California but across the country. For example, in *Federal Express Corp. v. Tennessee Pub. Serv. Comm'n,* 925 F.2d 962 (6th Cir. 1991), *cert.*

denied, ___ U.S. ___ (No. 90-1766 Oct. 7, 1991), the United States Court of Appeals for the Sixth Circuit affirmed a dismissal on *Younger [v. Harris,* 401 U.S. 37 (1971)] abstention grounds of a complaint in which Federal Express had raised the same claims against the Tennessee Public Service Commission that it raised herein against the California Public Utilities Commission. The Court's denial of certiorari in *Tennessee Pub. Serv. Comm'n* leaves intact a final, nonappealable order of the Tennessee Public Service Commission that Federal Express is subject to Tennessee's state regulation. *See* 925 F.2d at 964, 965, 966 n. 2, 969.

Thus, an irreconcileable conflict is created between the Ninth Circuit's decision below and the now-final order of the Tennessee Public Service Commission. A denial of certiorari in the instant case would mean that under final United States Court of Appeals and Tennessee Public Service Commission decisions having *res judicata* and *collateral estoppel effect,* Federal Express will be subject to state regulation in Tennessee but immune from state regulation in each of the states of the Ninth Circuit. Such a result appears contrary to the Court's stated standards governing review on writ of certiorari.

In addition, the Motor Carrier Authority, Indiana Department of Revenue, issued an order to show cause on August 22, 1991, in Docket No. 00059, *In the Matter of Federal Express Corporation, A Formerly Exempt Common Carrier of Property, Intrastate,* requiring Federal Express to show cause why it should not be subject to regulation by the State of Indiana with respect to its intrastate motor carrier operations.

The Ninth Circuit's decision creates an irreconcileable conflict between that court and the

State of Tennessee, and the issue will continue to engender controversies across the nation until it is resolved by this Court.[4]

V

THE COURT SHOULD GRANT CERTIORARI BOTH IN THE TWA CASES AND IN THE INSTANT CASE

On June 10, 1991, the Court invited the Solicitor General of the United States to express the views of the United States in *Morales v. Trans World Airlines, Inc.*, No. 90-1604, and *Attorney General of California v. Trans World Airlines, Inc.*, No. 90-1606 ("the *TWA* cases"). Those petitions raise inter alia the question of whether the Airline Deregulation Act of 1978 preempts the states from enforcing state deceptive advertising laws with respect to an air carrier's false advertising of air fares.

The preemption issue presented in the *TWA* cases and the preemption issue presented herein are distinct. The former petitions address the important issue of whether Congress, in enacting the Airline Deregulation Act, intended to single out the airline industry as opposed to all other industries for immunity from state enforcement of deceptive advertising laws. The latter petition addresses the important issue of whether Congress intended to render all activities of air carriers immune from state regulation, whether or not those activities are related to the provision of air transportation.

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[4] A denial of certiorari will render the Ninth Circuit's decision final as to the most populous state in the country, in which it is estimated that Federal Express transports, purely intrastate and exclusively by truck, more than a million packages per year.

Both issues are of great importance. The former petitions seek to ensure that states will continue to be able to protect the public from deceptive advertising practices by airlines. The latter petition seeks to ensure that motor carriers that also happen to be air carriers will continue to be bound, in their purely intrastate, truck-only motor carrier operations, by state regulatory requirements designed to assure fair competition, the prohibition of discriminatory practices, public safety on the highways of a state and the satisfaction of other public interest concerns. Surely Congress, in deregulating the "rates, routes, and services of any air carrier having authority . . . to provide air transportation," did not intend to immunize air carriers from their obligations to advertise truthfully or from their obligations to comply with state regulation of their activities having virtually nothing to do with the provision of air transportation. Each of these issues is worthy of the Court's plenary consideration in its own right.

The Court should grant certiorari with full briefing and oral argument both in the *TWA* cases and in the instant case.

CONCLUSION

Amici respectfully urge that the Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and set the cause for briefing and oral argument.

Respectfully submitted,

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November 22, 1991

MOTION FILED
NOV 22 1991

(4)

No. 91-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PATRICIA M. ECKERT, G. MITCHELL WILK, JOHN B. OHANIAN, DANIEL WM. FESSLER, NORMAN D. SHUMWAY, NEAL J. SHULMAN, and WILLIAM R. SCHULTE,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF PETITIONERS

The Applicant, the International Brotherhood of Teamsters ("IBT"), respectfully moves this court for leave to file the attached amicus curiae brief in support of the petition for the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The written consent of the Petitioner has been obtained and a copy thereof is being provided to the Court together with Applicant's Motion and Brief. Counsel for the Respondent, however, has refused to consent

to the filing of a brief by the IBT as amicus curiae. No reason or rationale whatsoever for this refusal was provided and repeated telephone calls to Respondent's counsel to discuss the matter and thereby perhaps avoid the filing of this motion, have been unanswered.

Affiliates of the IBT represent the interests of hundreds of thousands of motor carrier employees who are directly and adversely impacted by the Ninth Circuit's decision in this case. The IBT thus has a significant interest in this proceeding. The Applicant's brief will be of considerable assistance to the Court. Among other things, the IBT brief will discuss the major consequences which the Ninth Circuit's decision could have both on state regulation of motor carriers throughout the United States and on the labor laws which govern the relationship between those motor carriers and their employees. The IBT is in a unique position to discuss these important considerations and, unless the IBT's brief is permitted to be filed, they will not be brought to the attention of the Court. The IBT's brief will not broaden the issues presented; instead it will provide the Court with the important concerns of the people who may be most affected by the Ninth Circuit's decision.

Respondent has offered absolutely no reason for why the Court should be deprived of the assistance of this brief. Respondent's refusal to grant consent appears to be due solely to its view that its economic self interest would best be served by denying the Court the benefit of the views of the IBT. Such an arbitrary and narrow self-interest is no basis for depriving the IBT of the opportunity to participate in a proceeding which is of critical importance to its membership and to the motor carrier industry in general.

For the foregoing reasons, the IBT respectfully requests that its motion be granted and its amicus curiae

brief in support of the petition for certiorari be filed in this proceeding.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

The federal question presented in this case is the scope of the following preemption language set forth in the Airline Deregulation Act of 1978:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and

> effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. App. § 1305(a)(1) (1991).

On June 25, 1991, the United States Court of Appeals for the Ninth Circuit rendered a decision in the case of *Federal Express Corp. v. California Public Utils. Comm'n*, 936 F.2d 1075 (9th Cir. 1991), that expanded the scope of this statutory provision considerably beyond the express and clear intent of Congress. The Circuit Court held that not only did the section preempt state regulation of those functions of an air carrier relating to the provision of air transportation, but that its preemptive scope extended to cover intrastate trucking activities of an entity that happened to be an air carrier even when those trucking activities were not part of any air transportation service.

The Circuit Court's decision has effectively opened the door for any entity that can demonstrate that it qualifies as an air carrier by virtue of the fact that it operates one or more aircraft as part of its business, to shirk state regulation of all its activities, including its intrastate motor carrier activities, regardless of how unrelated and remote such activities may be from the provision of air transportation. The ultimate result of such a decision is that all businesses that can identify themselves as being air carriers have been singled out for more favorable treatment than that accorded other businesses in that they alone are exempt from having to adhere to and comply with the requirements associated with state regulation of their activities.

Air carriers have thus been accorded a blanket competitive advantage over all other businesses and, in particular, over other motor carriers engaged in intrastate trucking.

INTEREST OF AMICUS CURIAE

The International Brotherhood of Teamsters ("IBT"), is concerned with the anticompetitive and adverse economic effects of the Circuit Court's decision. Affiliates of the IBT act as the collective bargaining representatives for hundreds of thousands of workers in the motor carrier industry. As such, the IBT has a vital interest in any matter which may impact the economic viability of motor carriers and the terms and conditions of employment provided by them.

The improper deregulation of a part of the motor carrier industry in a state such as California, which is a direct consequence of the Ninth Circuit's decision, will have a direct impact on the economic condition of numerous motor carriers. For example, Federal Express will now be in the enviable position of being treated more favorably than the other 23,000 odd motor carriers engaged in intrastate trucking in California. Alone, out of all these motor carriers, Federal Express' trucking operations will not be subject to economic regulation by the state even though it transports approximately 200,000 packages entirely by ground and within the boundaries of California on a weekly basis. CR 46, Ex. 1, p. 9.[1]

Among the advantages that will accrue to the benefit of Federal Express will be the ability to, without public notice, change its rates, provide discounts and make private undisclosed agreements with targeted customers. This will afford Federal Express competitive opportunities that are denied its competitors who must comply with state regulation. Moreover, Federal Express will also be able to avoid payment of operational fees to California thus relieving it of monetary obligations to which its competitor motor carriers are subject.

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[1] As herein used, "CR" refers to the Clerk's Record in the Court of Appeals for the Ninth Circuit.

The combination of increased competitive opportunities for Federal Express and a decreased financial burden will result in severe competitive and economic disadvantage to the many competitors of Federal Express. These companies employ thousands of workers, a large number of whom are members of IBT affiliates. Since any negative economic situation experienced by these companies inevitably impacts their employees, the IBT has a strong and vital interest in seeking to eliminate the adverse economic result created by the misguided decision of the Ninth Circuit.

Moreover, the likelihood is great that Federal Express, emboldened by the Ninth Circuit's decision, will seek to extend this economic preference to its intrastate motor carrier services in other states. Indeed, other companies likely will follow the Federal Express lead and seek to avoid state regulation of their wholly intrastate motor carrier service by portraying themselves as air carriers. Not only will this further adversely affect the employees represented by IBT affiliates, but it also will lead to extensive and unnecessary litigation.

In this regard, it is virtually certain that states will seek to preserve their rightful regulatory roles and courts will be required to resolve the ensuing disputes. Only the intervention of this Court can prevent the proliferation of numerous lawsuits concerning the preemptive reach of section 1305(a)(1) of the Airline Deregulation Act, 49 U.S.C. App. § 1305(a)(1), with regard to intrastate motor carrier service. Indeed, judging from the existing cases construing section 1305(a)(1) in other contexts, lower courts will reach conflicting views with regard to whether and to what extent intrastate motor carrier regulation is preempted and this Court will at some point be required to resolve the matter. Rather than allowing such chaos and confusion to occur, this Court should act now and grant the petition.

IBT's interest is further enhanced by the fact that the Ninth Circuit's decision will have ramifications in the labor law area. In particular, the decision throws into question the determination of the appropriate statutory scheme which is to govern the management-labor relations of the component parts of a business that operates aircraft in any one segment of its operations. Thus, companies which operate aircraft in any part of their business operations may now claim that, in light of the Ninth Circuit's decision, they are to be regarded as air carriers with "integrated" operations and that therefore the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.* applies to their employees engaged in ground operations as opposed to the currently applicable National Labor Relations Act ("NLRA"). 29 U.S.C. §§ 151, *et seq.* The RLA is applicable to airlines and, unlike the NLRA, provides for a system-wide bargaining unit thereby making it more difficult to secure union representation. In any event, the Ninth Circuit's decision will create uncertainty in this area of labor law where none now exists. This disruption of well established labor law principles is of significant interest to the IBT.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION FINDING PREEMPTION IS MANIFESTLY ERRONEOUS AND CONTRARY TO THE STATUTE

It is well established that federal preemption not be presumed absent a clear manifestation of Congressional intent. *California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987); *Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. 1, 6 (1986); *Louisiana Pub. Serv. Comm'n v. Federal Communication Comm'n*, 476 U.S. 355, 369 (1986); *De Canas v. Bica*, 424 U.S. 351, 359 (1976); *New York Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 413 (1973); *United States v. Smith*, 723 F. 2d 852, 859 (1st Cir. 1984), *cert. denied*, 469 U.S. 841 (1984). Such Congressional intent may be evinced either

expressly by the language of the statute or, in appropriate circumstances, may be implied. As will be shown, no such express or implied intent can be found with regard to federal preemption of state regulation of intrastate motor carrier transportation which is not part of an air transportation service.

A. No Express Preemption

Section 1305(a)(1) of the Airline Deregulation Act does not provide expressly for federal preemption of state regulation of the motor carrier services of an airline. As noted, the wording of the section provides that it preempts state regulation only of "air transportation." 49 U.S.C. App. § 1305(a)(1). Such transportation is defined in 49 U.S.C. § 1301(10) as "interstate, overseas, or foreign *air* transportation . . ." (Emphasis added). No mention whatever is made of motor carrier service provided by an airline. Had Congress intended to expressly preempt all motor carrier services provided by an airline it could have said so. An examination of the legislative history of the section further reveals a singular lack of reference to ground transportation. H.R. Rep. No. 1211, 95th Cong., 2nd Sess. 15-16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3751-52; H.R. Conf. Rep. No. 1779, 95th Cong., 2nd Sess. 94-95, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3773, 3804-5; H.R. Rep. No. 793, 98th Cong., 2nd Sess. 147, *reprinted in* 1984 Code Cong. & Admin. News 2857, 2857-2873; H.R. Conf. Rep. No. 1025, 98th Cong., 2nd Sess. 13-21, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2874, 2874-2882.

The Ninth Circuit's decision ignores this clear statutory language. To the contrary, the Circuit Court distorts the proper scope of federal preemption provided for in Section 1305(a)(1) by arrogating to Congress the intent to preempt states from regulating virtually all the activities of an air carrier operating within their boundaries, including its intrastate trucking activities, even though such

activities are not part of the carrier's air transportation operation. There is no basis in the statutory language or the legislative history for finding that Congress had such a wide reaching preemptive intent in enacting Section 1305(a)(1). The terms of this section make clear that states only were to be preempted from regulating the rates, routes or services of an air carrier in providing air transportation.

The Ninth Circuit erroneously concluded that state regulation of intrastate motor carrier rates and services were preempted because such motor carrier rates and services were somehow related to an integrated air transportation. This rationale, however, goes far beyond the express statutory language and preempts state regulation of activities which are far removed from air transportation. Thus, the intrastate rates and services of Federal Express which were found to be preempted from state regulation pertained to the transportation of packages which had nothing to do with air service; indeed, the packages were moved wholly by motor carriers and never saw the inside of an airplane.

Effectively, the Ninth Circuit's decision means that activities of an air carrier which are not part of air transportation are exempt from state regulation merely by virtue of the fact the activity is performed by an air carrier. This is a manifest distortion of the statutory language.

B. No Implied Preemption

It is equally clear that Congressional intent to preempt state regulation of the instrastate motor carrier services of an airline cannot be implied. To conclude that there is implied preemption, it must be found that the scheme of regulation is so comprehensive as to lead to the reasonable inference that Congress "left no room" for supplementary regulation, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or that the federal in-

terest is so dominant as to preclude enforcement of state laws on the same subject. *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). No such finding can be made here.

Again, the legislative history of section 1305(a)(1) demonstrates that in enacting this section Congress was preempting states only from regulating airline transportation services. Congress wanted to ensure that states did not regulate in the area of airline routes, rates, and services which it had chosen to deregulate. Indeed, Congress' purpose in enacting the Airline Deregulation Act of 1978 was to encourage competition among the airlines by extricating the federal government from the business of economic regulation of airlines. Whereas prior to 1978, the federal government had rigidly controlled the rates, routes, and services an airline could offer, the Airline Deregulation Act was intended to put an end to this control and thus encourage competition and lower prices among airlines. 49 U.S.C. § 1302(a)(3) (1991); *see also* H.R. Rep. No. 1211 95th Congress, 2nd Sess. 15-16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3773. Section 1305(a)(1) of the Airline Deregulation Act was intended to ensure that no state or local governmental entity could step in and fill the regulatory void which Congress had intentionally created. *See* 123 CONG. REC. 30,595 (1977); Pub. L. No. 95-504, 92 Stat. 1705 (1978).

The purpose of section 1305(a)(1) will not in any way be thwarted or threatened by state regulation of the intrastate motor carrier activities of airlines which are not part of their air transportation services. Here, for example, California is seeking only to regulate the transportation of packages by motor carriers which are not part of any through air transportation. As noted, these packages move exclusively by truck between points within the borders of California and never see the inside of an airplane. It is not possible, the IBT submits, to conclude that such state regulation could have any adverse affect

on the competitiveness of the routes, rates or services of airlines. Accordingly, California's limited regulation of Federal Express' intrastate motor carrier service cannot be found to violate the preemptive statutory scheme constructed by Congress.

It is important to note that the area of motor carrier regulation is one that states have traditionally occupied. This regulation is perceived by California and other states as being in the public interest and providing for the health and safety of its citizens. In such circumstances there is a strong presumption against finding preemption of state law. *California v. Federal Energy Regulatory Comm'n*, 110 S.Ct. 2024, 2029 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *West v. Northwest Airlines, Inc.*, 923 F.2d 657, 659 (9th Cir. 1991) (citing *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989)).

C. The Ninth Circuit Confused Commerce Clause Analysis With Preemption

Before the district court and the Ninth Circuit, Federal Express argued that state regulation of its intrastate motor carrier services excessively burdened interstate commerce and should thus be prohibited under the Commerce Clause to the Constitution. U.S. Const. art. I, § 8, cl. 3. The district court found there was no violation of the Commerce Clause and the Ninth Circuit declined to reach the issue because it found preemption. *Federal Express v. Public Utils. Comm'n*, 936 F.2d 1075, 1077 (9th Cir. 1991). In effect, however, a close analysis of the Circuit Court's opinion shows that its decision to preempt state regulation of Federal Express' intrastate motor carrier service was based upon an abbreviated and perfunctory Commerce Clause analysis. Thus, it first decided that Federal Express was an air carrier whose operations were "integrated". It then reasoned that state regulation of any activity engaged in by Federal Express would amount to an improper interference with an inte-

grated interstate air operation. While the Circuit Court used a preemption label, its analysis and ultimate conclusion was based upon Commerce Clause considerations and was unrelated to the concept of federal preemption.[2] Federal preemption, of course, is a separate and distinct subject and does not involve a factual analysis, as does the Commerce Clause, as to whether state regulation improperly burdens interstate commerce.[3]

It is clear that not only did the Circuit Court misconstrue the statute and Congress' intent[4] but it also confused two unrelated concepts, namely Commerce Clause issues and federal preemption issues. The dissent recognized the majority's confusion: "To accept this argument is to confuse Federal Express' other commerce clause arguments with its preemption arguments." *Federal Express v. Public Util. Comm'n*, 936 F.2d 1975, 1081 (9th Cir. 1991).

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[2] The Ninth Circuit's confusion and reliance upon Commerce Clause considerations is further evident from its reasoning that California was preempted from regulating Federal Express' intrastate trucking service because such state regulation was "economic" in nature. In the Ninth Circuit's view any state regulation that economically impacted one part of Federal Express' integrated operations, even though it may be remote from the air transportation services, would ultimately impact and interfere with interstate commerce.

[3] Had the Circuit Court fully and properly considered the issue within the framework of the Commerce Clause, as the district court did, and applied the proper legal test therefor as set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), it would have concluded that California's regulation of the intrastate trucking operations of Federal Express was perfectly consonant with the requirements of the Commerce Clause.

[4] In effect, the "economic" test adopted by the Ninth Circuit leads to the absurd conclusion that any regulation of Federal Express which impacts the company's profits must be deemed preempted. This would mean, for example, that a state tax on the real or personal property of Federal Express would be preempted because it constituted economic regulation. This is certainly far beyond what Congress had in mind in deregulating airlines.

The Supreme Court should grant the petition to remedy this misguided analysis and therby avoid unwarranted confusion between the Commerce Clause and federal preemption.

II. THE NINTH CIRCUIT'S DECISION WILL LEAD TO UNNECESSARY LITIGATION, CHAOS AND CONFUSION

In light of the Ninth Circuit decision, Federal Express and other similarly situated entities, will seek to preclude other states from regulating their intrastate motor carrier activities.[5] The states, on the other hand, are sure to resist these efforts. Indeed, forty-two states currently regulate intrastate operations of motor carriers and despite requests to do so over the last several years, many state governments have refused to enact legislation to deregulate intrastate motor carrier service. Baker, *1990 Summary of Motor Carrier Regulations of the Respective States of the United States* XL Your Letter of the Law 13 (Transportation Lawyers Ass'n 1991).

The outcome of these conflicting interests will inevitably be an abundance in litigation around the country as courts are used as battlegrounds by those businesses qualifying as air carriers who are seeking to divest states of their traditional roles in regulating motor carrier operations within their boundaries. These businesses will attempt to avoid state regulation of their motor carrier activities solely on the basis that their motor carrier service is provided by an air carrier as part of an "integrated" operation. The lower courts inevitably will struggle to define the scope of an integrated operation and

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[5] It has been and continues to be a goal of Federal Express to achieve full deregulation of all its motor carrier operations. Federal Express has tried to achieve this through Congress, but has hitherto failed. *See* Safe and Competitive Trucking Act, H.R. 4261, introduced in the 101st Congress, 1st Session (1990). It is now attempting to achieve its goal using the courts.

will reach varied and confusing results. There will be no understanding or agreement with regard to the meaning of section 1305(a)(1).

Indeed, the existing case law pertaining to section 1305(a)(1) already is in a confused state. On the one hand, this section has been narrowly interpreted so that state preemption of an activity will only be found if the activity is closely related to the rates, routes and services of the air carrier. For example, in *Air Transp. Ass'n of America v. Public Utils. Comm'n of California*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988), the same Ninth Circuit held that a California Public Utilities Commission regulation prohibiting telephone customers in California from surreptitiously overhearing or recording conversations without notice to the parties to the conversation was not preempted because the regulation did not relate directly or indirectly to rates, routes or services of the air carrier.[6] More recently, in *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (1991), the Ninth Circuit held that a state claim for breach of a covenant of good faith and fair dealing under Montana law brought by a passenger who was denied a seat on an overbooked flight was not preempted, because the use of the words "relating to services" in section 1305(a)(1) was not intended to encompass all state laws affecting airline services however tangentially. The court stated that to find preemption would result in an undue expansion of preemption and ignore the presumption against federal preemption in this traditional state law area. The court also noted that state laws that merely have an

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[6] *Air Transport Ass'n* 833 F.2d 200 (9th Cir. 1987), cannot be squared with the Ninth Circuit's decision in Federal Express. In both cases, the activities that were being sought to be preempted were not related to the air transportation of the airline. In that case, the Ninth Circuit found no preemption; yet, the same Court in *Federal Express* concluded that preemption did exist simply because the activities in question were provided by an air carrier. *See also West v. Northwest Airlines, Inc.*, 923 F.2d 675 (9th Cir. 1991).

effect on airline services are not preempted. Similarly, *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 635 F.2d 67, 74 (2d Cir. 1980), the Second Circuit held that a state claim under section 245(1) of New York's General Business Law which prohibited the operation of an aircraft in a careless and reckless manner was not preempted by section 1305(a)(1) on the grounds that the Airline Deregulation Act does not preclude common law remedies.[7]

On the other hand, other decisions give section 1305 (a)(1) a more expansive interpretation. Thus, in *Trans World Airlines v. Mattox*, 897 F.2d 773 (5th Cir. 1990), the issuance of an injunction by a district court enjoining the state Attorney General of Texas from enforcing the state's deceptive practices laws against airline advertising on the grounds that such state laws "relate to" airline rates was upheld as being preempted by section 1305.[8] In *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984), a blind passenger brought a claim alleging that his rights to full and equal access under the California State Civil Code had been violated because he was required to occupy a bulkhead

[7] *See also People of State of N.Y. v. Trans World Airlines*, 728 F. Supp. 162, 176 (S.D.N.Y. 1989) (section 1305(a)(1) did not expressly preempt New York law governing deceptive advertising). In other cases finding preemption of state law, it was clear that the activity involved pertained directly to air transportation. *See, e.g., O'Carroll v. American Airlines*, 863 F.2d 11, 13 (5th Cir. 1989), *cert. denied*, 490 U.S. 1106 (1989) (section 1305 preempted a ticket holder's state law claim for allegedly wrongful exclusion from the flight); *Anderson v. U.S. Air*, 818 F.2d 49, 57 (D.C. Cir. 1987) (state law obligation of an air carrier to give courteous service was expressly preempted by section 1305).

[8] This decision is patently in conflict with the decision of the Southern District Court of New York in *People of State of N.Y. v. Trans World Airlines*, 728 F. Supp. 162 (S.D.N.Y. 1989), where similar New York laws were held not to be preempted by section 1305. The conflict between these decisions is illustrative of the confusion that has arisen over the rationale to be applied in interpreting section 1305.

seat on an aircraft. The Ninth Circuit managed to extend the preemptive scope of section 1305(a)(1) by finding that the issue was not really one of equal access but pertained rather to the seating policies of the airlines. By way of this strained interpretation of the facts, the Ninth Circuit then reasoned that such seating policies related to the services of the airline and were thus preempted by section 1305(a)(1).

The foregoing demonstrates that there is considerable confusion in the courts (and within the Ninth Circuit itself) as to the scope of section 1305(a)(1) and the rationale that is to be applied in determining the range of its preemptive effect. This confusion will be further exacerbated by the multitude of law suits which are sure to follow on the heels of the *Federal Express* decision.

The confusion and consequent proliferation in litigation that is certain to follow as a result of the Ninth Circuit's decision is further compounded by the fact that the court provided no standard against which a state or a court can determine whether an entity flying aircraft as part of its operations provides an "integrated" air service. Yet, the Ninth Circuit based its decision that Federal Express' intrastate trucking activities were free from state regulation entirely on its finding that these activities were so integral a part of Federal Express' air transportation activities as to make Federal Express an "integrated" air carrier. The absence of a clear standard as to what constitutes an "integrated" air service can only result, as the dissent noted, in complete and utter chaos and confusion. *Federal Express v. California Public Utils. Comm'n,* 936 F.2d 1075, 1081 (9th Cir. 1991). Will a company operating a single Cessna be able to contend that the five hundred trucks it operates wholly within a state are exempt from state regulation because it provides an integrated air service?

Even when it is evident that a company is primarily engaged in the business of providing air transportation

services, the potential reach of the Ninth Circuit's decision is unclear and could lead to an absurd result. For example, if an airline owns a chain of hotels and that airline were to advertise and market a service that, for a fixed sum, provided air transportation and a hotel room, the airline could argue that its service was an "integrated" service and thus all aspects of its hotel business were exempt from any state economic regulation.[9] Whereas, it is, the IBT submits, absurd to conclude that a state is preempted from regulating various aspects of a hotel business operating within its borders, it is equally misguided to find that intrastate motor carrier services, not part of air transportation, are preempted from state regulation.

Given the current confusion and conflict between the courts and within the Ninth Circuit itself over the proper reach of section 1305(a)(1), and to avoid further unnecessary and wasteful litigation over this issue, the petition for certiorari should be granted. In *Nader v. Allegheny Airline, Inc.*, 426 U.S. 290 (1976), the Court held that the Federal Aviation Act of 1958 did not preempt common law remedies against an air carrier engaging in unfair or deceptive practices. Subsequent thereto, however, Congress enacted section 1305(a)(1) and thus *Nader* no longer can be relied upon with regard to the resolution of preemption issues. It is therefore important for this Court to revisit and clarify the scope of preemption in this area.

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[9] Federal Express in its Opening Brief before the Ninth Circuit (at page 38) conceded that "[t]he District Court was correct that at some point a service offered by an air carrier may become too remote from its core transportation function to fall within the preemption protection of § 1305(a)(1)." In its Reply Brief (at page 15) Federal Express further conceded that ". . . some cases might present the Court with a difficult line drawing problem".

III. THE NINTH CIRCUIT'S DECISION BRINGS UNCERTAINTY AND CONFUSION TO THE AREA OF LABOR LAW

In concluding that Federal Express was an "integrated" air carrier and thus its intrastate motor carrier service was not subject to state regulation, the Ninth Circuit has brought confusion to an area of labor law where none existed before. Hitherto, in accordance with well-established precedent, the National Mediation Board ("NMB") and the National Labor Relations Board ("NLRB") have determined whether the RLA or the NLRA governs the organization of the labor-management relations of businesses. Generally, when such jurisdictional issues arise, the relevant board will first determine if the operations of a business are "integrated". This is important because if the business is deemed to be an integrated air operation, the RLA would apply, whereas if it is not integrated, the airline service would be subject to the RLA but the ground service would be governed by the NLRA. *Flight Terminal Sec. Co.*, 16 NMB 387, 397 (1989); *Olympic Sec. Servs., Inc.*, 16 NMB 277, 282 (1989); *Globe Sec. Sys. Co.*, 16 NMB 208, 213 (1989); *CFS Air Cargo, Inc.*, 13 NMB 369 (1986). These two labor statutes are quite different. Among other things, the RLA requires that a bargaining unit be done on a systemwide basis, (45 U.S.C. § 152 Ninth; *Union Pacific Railroad System*, 18 NMB 516 (1991); *Burlington Northern Railroad*, 18 NMB 240 (1991); *Atchison, Topeka and Santa Fe Ry. Co./Russell*, 12 NMB 95, (1985); *Varig Airlines*, 10 NMB 223, 224 (1983)), whereas the NLRA does not have such a requirement.

In determining if a business is integrated, both the NMB and the NLRB take into account a host of factors. They will look to see if the various components of the business are separately managed or whether they have shared directors, officers and management personnel; if the labor relations and personnel functions are different

with each component having its own payroll, salary and compensation policies; if the uniforms worn are different or if the holidays, sick leave policies, employment applications, employee credit unions or even the labor counsel are different. These federal labor agencies will further look to see if there is cross-utilization of employees or equipment and if the bank accounts, accounting and computer systems are different. The advertising and marketing functions will also be examined to determine if they are separate. *CFS Air Cargo, Inc.*, 13 NMB 369 (1986) and *Allied Aviation Serv. Co.*, 11 NMB 239 (1984). The analysis involved is thus a far-reaching and detailed exercise.

By determining that Federal Express' motor carrier activities are integrated with its air carrier operations without any regard for the traditional role played by the labor boards in making such determinations, and without any consideration of the factors typically considered by them, the Ninth Circuit has created uncertainty and confusion. This decision will be relied upon, improperly in the IBT's view, in future disputes over the appropriate labor statute that is to apply to a given operation. To avoid this decision potentially disrupting well accepted and established principles in this area of labor law, the petition for certiorari should be granted.

IV. THERE IS CONSIDERABLE INTEREST IN SECTION 1305(a)(1) OF THE AIRLINE DEREGULATION ACT

The measure of interest in the scope of section 1305 (a)(1) is demonstrated by the fact that this issue has already been the subject of various cases decided by a number of Circuit Courts around the country. Moreover, there is currently pending before the Supreme Court a petition for a writ of certiorari in Docket No. 90-1606. In this petition, the Attorney General of Texas, supported by the Attorneys General of thirty-one other states as amici curiae, requests that the Supreme Court

reverse the decision of the Fifth Circuit Court of Appeals in *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir. 1990), which held that section 1305(a)(1) exempts airlines from the application of state false and deceptive advertising laws.

Although the petition in Docket 90-1606 is worthy of consideration by the Supreme Court, the IBT submits that this case merits the attention of the Supreme Court even more. This is so because the issue in our case does not involve activities that can even arguably be said to qualify as services of an airline related to its air transportation operations. The intrastate transportation of packages by truck that never see the inside of an airplane clearly do not relate to either the "rates, routes, or services" of an airline. This case therefore presents the issue of whether activities provided by an air carrier, which are wholly unrelated to its air services, are to be exempted from state regulation under section 1305(a)(1). This issue is not clearly presented in Docket 90-1606.

CONCLUSION

A writ of certiorari should issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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No. 91-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PATRICIA M. ECKERT, G. MITCHELL WILK, JOHN B. OHANIAN, DANIEL WM. FESSLER, NORMAN D. SHUMWAY, NEAL J. SHULMAN, and WILLIAM R. SCHULTE,

Petitioners,

vs.

FEDERAL EXPRESS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF CALIFORNIA TRUCKING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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No. 91-502
In The
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Petitioners,

vs.

FEDERAL EXPRESS CORPORATION,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The California Trucking Association respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of petitioners, The Public Utilities Commission of the State of California ("CPUC"), Patricia M. Eckert, G. Mitchell Wilk, John B. Ohanian, Daniel Wm. Fessler, Norman D. Shumway, Neal J. Shulman, and William R. Schulte. The individual petitioners are the Commissioners of the CPUC and its Executive Director and Director of the Transportation Division. The petitioners have consented to the filing of this brief, but the respondent, Federal Express Corporation, has not.

The California Trucking Association ("CTA") is comprised of approximately 2,000 trucking companies, most

of which are regulated by the California Public Utilities Commission. Members of the CTA, along with all other state-regulated trucking companies in California, are subject to the comprehensive requirements of the California Public Utilities Code and the regulations of the CPUC. In addition, these regulated carriers are required to pay the Transportation Rate Fund Fee, now one-half of one percent of gross operating revenue, that is used almost exclusively to fund the regulatory and trucking safety program of the CPUC. As a result of this regulation which is applied uniformly to the trucking companies providing intrastate service in California, the carriers compete for business on an equal basis from a regulatory standpoint.

However, the Ninth Circuit has improperly destroyed this regulatory equality as to one intrastate motor carrier solely because that motor carrier also happens to be an air carrier. By extending the federal preemption in Section 105 of the Airline Deregulation Act, 49 U.S.C. App. § 1305(a)(1), which was intended to apply only to the rates, routes or services involved in the air operation, the Ninth Circuit has immunized the intrastate ground service of Federal Express Corporation ("Federal Express"), the same type service provided by thousands of other regulated California carriers, from California trucking regulation. This decision has improperly invaded the authority specifically reserved by Congress to the states. But of foremost importance to the *amicus* is that its member carriers are faced with an insurmountable competitive disadvantage in the same market served by Federal Express, which (under the Ninth Circuit decision) need not bear the cost of regulation and can adjust

its rates at will and without Commission restraint in order to secure the customers of regulated carriers.

The interest of the CPUC in this proceeding is quite different from the interest of the *amicus curiae*. The Commission, as an agency of the state, is attempting to enforce the California constitution and the California laws governing intrastate motor carriers. On the other hand, the regulated truckers in California are seeking to preserve their ability to compete against an unregulated, mammoth company.

It is respectfully submitted that the attached brief *amicus curiae* of the CTA in support of the petition for writ of certiorari will provide the Court with additional insight into the applicability of the federal preemption to the facts of this case. The interests of the CTA and its members would not otherwise be adequately presented by the parties to this case.

For the foregoing reasons, CTA respectfully requests that the Court grant it leave to file the attached brief *amicus curiae*.

Dated: November 21, 1991.

Respectfully submitted,

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QUESTIONS PRESENTED

1. When Congress preempted state regulation "relating to rates, routes, or service of any air carrier," did it also preempt uniform state regulation of intrastate ground transportation of packages which had never been carried by air when the trucker also happens to be an "air carrier?"

2. Has Congress preserved the power of the states to regulate the intrastate ground transportation of packages but at the same time prohibited those states from regulating that same intrastate ground transportation of packages when the trucker also happens to be an "air carrier," thereby giving that trucker an unfair competitive advantage in providing intrastate ground transportation?

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THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PATRICIA M. ECKERT, G. MITCHELL WILK, JOHN B. OHANIAN, DANIEL WM. FESSLER, NORMAN D. SHUMWAY, NEAL J. SHULMAN, and WILLIAM R. SCHULTE,

Petitioners,

vs.

FEDERAL EXPRESS CORPORATION,

Respondent.

BRIEF OF CALIFORNIA TRUCKING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The California Trucking Association ("CTA"), comprised of approximately 2,000 trucking companies most of which are regulated by the California Public Utilities Commission, as *amicus curiae*, submits this brief in support of the petition for certiorari filed by The Public Utilities Commission of the State of California, Patricia M. Eckert, G. Mitchell Wilk, John B. Ohanian, Daniel Wm. Fessler, Norman D. Shumway, Neal J. Shulman, and William R. Schulte, and urges that the petition for certiorari be granted so that the Court may review on the

merits this case, involving important federal-state issues, which was decided improperly and erroneously by the United States Court of Appeals for the Ninth Circuit. *Federal Express Corporation v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991).

INTERESTS OF THE *AMICUS CURIAE*

The California Trucking Association was chartered in 1934 for the purpose of stimulating and improving the trucking industry in the State of California and providing benefits for its members. It is recognized as the statewide association representing the trucking industry in California. Most members of the CTA have operating authority of some sort issued by either the California Public Utilities Commission ("CPUC") or the Interstate Commerce Commission to provide service between points in California. Many of its members have both intrastate California and interstate operating authority.

CTA members have secured their California operating rights either after initial application proceedings, some of which were lengthy and included vigorous opposition, or by acquisition from previously authorized trucking operators. Many member-carriers have a substantial investment in the California rights under which they operate. Since members of the CTA are subject to the jurisdiction of the CPUC, they operate under the California Public Utilities Code and CPUC regulations and pay California transportation rate fund fees based upon intrastate revenue to support California's regulatory program for the trucking industry. For the Fiscal Year 1991-1992, the transportation rate fund fee is one-half of one percent of gross operating revenue. CTA members provide service under tariffs or rate schedules containing rates approved by the Commission.

The Ninth Circuit has improperly ruled that the purely intrastate ground trucking operations of Federal Express Corporation ("Federal Express") in California — the same business conducted by the majority of the 2,000 members of the CTA — is exempt from any economic regulation by the CPUC under the federal preemption of 49 U.S.C. App. § 1305(a)(1) merely because Federal Express is also an air carrier. Federal Express is one of the largest transportation companies in the country, having transported 21 million packages systemwide in July 1988. Of these, approximately 850,000 packages moved wholly between points in California, either by a combination of air and ground movements, or solely by ground with no air transportation involved whatsoever (App. F, p. 2).[1] Federal Express operates one of the largest fleets of trucks in California.

Not only does the Ninth Circuit decision exempt from regulation existing intrastate trucking of Federal Express in California, but it will exempt any California ground transportation Federal Express wishes to provide. If the decision is permitted to stand, Federal Express will operate without California operating authority; may make individual rate agreements with shippers, without any requirement for Commission approval, undercutting the Commission-regulated rates of existing California truckers; may discriminate in rate charges to favored shippers; will not incur the additional costs of regulated truckers; and otherwise will have a decisive competitive advantage over other truckers. Federal Express is able to engage in unregulated California service with an insurmountable competitive advantage. The "level playing field" resulting from the uniformly applied state

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1 Record reference here is to the Appendix to the petition for writ of certiorari.

trucking regulation is no longer applicable to Federal Express solely because it also operates as an air carrier.

All members of the CTA will be irreparably harmed and will incur competitive losses to an unregulated Federal Express which may very well become an unregulated trucking behemoth if the Ninth Circuit decision is permitted to stand. This certainly was not the Congressional purpose in enacting Section 105(a)(1) of the Federal Aviation Act, 49 U.S.C. App. § 1305(a)(1).

The members of the CTA are critically affected by the Ninth Circuit decision and have a vital interest in having it overturned. The CTA is bringing the plight of its members to the attention of the Court in order to aid the Court in addressing the issues presented in the petition for certiorari.

SUMMARY OF ARGUMENT

Section 105(a)(1) of the Federal Aviation Act, 49 U.S.C. App. § 1305(a)(1), as applicable here, provides:

> "[N]o State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law *relating to rates, routes, or services of any air carrier* having authority under title IV of this Act . . . to provide air transportation." (Emphasis added.)

The clear language of the Act, its legislative history and judicial interpretation of Section 105(a)(1) show beyond any doubt that the federal preemption precluding state regulation "relating to rates, routes or services of any air carrier" does not apply to the purely intrastate trucking

operations of a company that also happens to be an "air carrier."

Of most importance to the CTA, the Ninth Circuit decision gives a grossly unfair competitive advantage to Federal Express. The 2,000 members of the CTA and other carriers that provide the same California intrastate trucking service as Federal Express must comply with all California trucking laws and regulations and pay the fees assessed by the California Commission. All of this adds to the costs of existing carriers in providing service. In addition, Federal Express, without any Commission control whatsoever, can undercut the rates of California intrastate truckers to attract business. This substantial competitive advantage was surely never intended by Congress. This is further evidence that the federal preemption does not free the intrastate ground service of an air carrier from state regulation to the detriment of other truckers providing the same service who are not also air carriers.

ARGUMENT

I. THERE IS A PRESUMPTION AGAINST FINDING PREEMPTION OF STATE LAW IN A FIELD TRADITIONALLY OCCUPIED BY THE STATES

The regulation by the California Public Utilities Commission began more than 70 years ago and predates the federal regulation — commencing in 1935 — of the motor carrier industry. Under the federal Motor Carrier Act, the jurisdiction conferred upon the Interstate Commerce Commission does not "affect the power of a State to regulate intrastate transportation provided by a motor

carrier" and does not authorize the ICC "to prescribe or regulate a rate for intrastate transportation [of property] provided by a motor carrier." 49 U.S.C. § 10521(b)(1) and (2). And the jurisdiction of the ICC over transportation of property by a motor carrier "does not . . . allow a motor carrier [of property] to provide intrastate transportation on the highways of a State." 49 U.S.C. § 10521(b)(3). Congress intended to allow the continuance of the traditional state regulation of intrastate motor carrier operation.

The legislative history of the preemption of state regulation in Section 105(a)(1) of the Act, 49 U.S.C. App. § 1305(a)(1), establishes that the preemption in no way diminished the power of the states to regulate intrastate trucking. The advocates for the preemption recognized that deregulation of the airline industry contemplated by the Airline Deregulation Act of 1978 would eliminate federal regulatory control over most airline operations. There was fear that this absence of regulation would prompt the states to attempt to regulate in those areas previously occupied by the federal government. This potential entry by the individual states into regulation of areas previously under federal regulation has been referred to as "Balkanization" where the airline industry could be subject to each state's varying regulation in place of the prior federal regulation applicable nationwide.

The intended effect of Section 105(a)(1) was made clear by the Civil Aeronautics Board (Regulatory Reform in Air Transportation, Hearings before the Subcommittee on Aviation of the Senate Committee on Commerce, Science and Transportation, 95th Congress, 1st Session, Serial No. 95-10, 1977, p. 191):

> The new section 105 would incorporate into the statute various court

> decisions which hold that the Federal government has exclusive jurisdiction to regulate rates, routes, and service in interstate, overseas, and foreign air transportation. The Board supports this provision. It would only preclude state regulation which could frustrate the intent of Federal regulatory reform legislation by substituting state utility-type regulation for Federal regulation being loosened or withdrawn.

The following references to the federal preemption in the 1977 hearings on Regulatory Reform in Air Transportation before the Senate Subcommittee on Aviation of the Senate Committee on Commerce, Science and Transportation, 95th Congress, 1st Session, Serial No. 95-10, are also on point (at p. 621):

> [The preemption is to avoid] a chaotic condition of substituting state and local regulation for federal regulation to the extent that federal regulation does not exist and creating a potential overlap and conflict where both the CAB and a state or locality seek to regulate the same subject matter.

and (at page 1164):

> [MR. GINTHER]: That was certainly the intent behind the provision in the Kennedy-Cannon bill to in effect maintain status quo but also to make sure that such States as Pennsylvania, for example, could not regulate

> interstate activities of federally certified carriers.

and (at page 1990):

> We understand the object of the provision to be the prevention of states expanding their air transportation regulatory activities at the same time that Federal Regulations are being loosened. . . .

The Fifth Circuit in *Trans World Airlines v. Mattox*, 897 F.2d 773 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 307 (1990), *cert. pending*, Nos. 90-1604 and 90-1606, recognized the possibility of Balkanization with federal deregulation by pointing out certain legislative history of the 1978 Deregulation Act:

> The Sunset provisions of the 1978 Deregulation Act did not deal with the authority to protect consumers and to prevent unfair competitive practices. H.R.Rep. No. 793 at 3; 1987 U.S. Code Cong. & Admin. News at 2859. The Committee concluded that this important authority should be continued and should be exercised by DOT. H.R.Rep. No. 793 at 4-6; 1987 U.S. Code Cong. & Admin. News at 2860-62. The following passages in the report are of particular interest:
>
> > In addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin

> to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

And the First Circuit, in *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989), stated:

> In reducing federal economic regulation of the field to allow the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation. Congress expressly preempted state and local regulation by enacting § 105(a). . . .

Congress made clear that by including the express preemption of Section 105 in the Deregulation Act, it did not intend for the states thereafter to enact economic regulation to take the place of the federal regulation being terminated. *Trans World Airlines v. Mattox, supra*, 897 F.2d at 787.

Since the federal government has at all times permitted the states to exercise economic control over purely intrastate trucking, 49 U.S.C. § 10521(b)(1) and (2), the continued jurisdiction of the states in this activity could in no way fill a void left by federal deregulation. It is clear that this state regulation was unaffected by the federal preemption in Section 105.

Further evidence of the continued validity of state regulation, even though the intrastate trucking is conducted by an air carrier, is the fact that in 1987, Section

105(a)(1) of the Act was amended so that the preemption clause would apply to "air transportation" rather than "interstate air transportation." This extension of the preemption to all air transportation instead of only interstate air transportation clearly evidences the intent of Congress to make the preemption applicable to intrastate air transportation. Congress stopped short of extending the preemption to intrastate *ground* transportation service provided by an air carrier.

Where state regulatory powers are challenged, courts must presume that state laws are not preempted unless preemption is shown to be the clear purpose of Congress. *See, e.g., Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission*, 659 F.2d 903, 919 (9th Cir. 1981), *aff'd sub nom. Pacific Gas & Electric Co. v. Energy Resources Commision*, 461 U.S. 190, 206 (1983). (Courts assume that states' police power takes precedence unless Congress clearly demonstrates a contrary intent.) The presumption against preemption of state regulation and in favor of state sovereignty is strong, to be rebutted only upon a clear showing that federal preemption is the clear and manifest intent and purpose of Congress. *Pacific Gas & Electric Co. v. Energy Resources Commission*, 461 U.S. 190, 205 (1983) (There is the assumption that the historic police powers of the states were not to be superseded by federal legislation unless that was the clear and manifest purpose of Congress.); *Siuslaw Concrete Const. v. Washington Department of Transportation*, 784 F.2d 952, 958 (9th Cir. 1986). The decision of the Ninth Circuit has unduly expanded the preemption of Section 105(a)(1) and ignored the presumption against federal preemption in the traditional state law area of economic regulation of intrastate trucking.

II. THE ESCAPE OF FEDERAL EXPRESS FROM CALIFORNIA REGULATION OF ITS INTRASTATE TRUCKING BUSINESS IS GROSSLY UNFAIR TO OTHER CALIFORNIA TRUCKERS

Federal Express complains that California regulation of its intrastate trucking activity will be burdensome to it in the following regards:

1. Federal Express may not reduce rates to meet competition without showing that the reduced rates are cost justified and Federal Express cannot make such a showing (A-2).[2]

2. Regulations for reducing tariff rates "prevent Federal Express from competing by attempting to get new business from our competitors. Preventing Federal Express from competing and attempting to obtain business presently handled by other carriers in California will affect our ability to grow, become more profitable. . . ." (A-4).

3. Federal Express has not cost justified its volume discounts to the Commission and they have not been approved (A-2).

4. Cost justification of rates would divulge Federal Express' trade secrets concerning costs, deliveries, wage rates, *etc.* (A-4).

5. Federal Express' rates are not related to distance and violate Commission rules and regulations (A-2).

---

2 References hereinafter are to the included Appendix.

6. The refund policy is an illegal rebate under Commission rules and regulations (A-2).

7. Federal Express objects to the requirement that it file with the Commission all contracts with customers and offer the same discount and same price or service arrangement to all customers who are similarly situated (A-4).

8. Federal Express would have to determine which shipments are California intrastate ground as distinguished from air and interstate shipments (A-11).

9. Federal Express would have to change its shipping documentation to comply with California regulations (A-12).

10. There will be an increased cost to comply with California requirements and this will increase rates to customers and reduce Federal Express' profitability (A-12, 13).

11. Implementing the California rules for handling claims would be an added expense to Federal Express (A-14).

12. Federal Express would have to comply with the Commission's requirement for record retention (A-8).

13. Federal Express would have to comply with the Commission's requirement that customers pay freight bills in seven days (A-5, 6).

14. Federal Express is required to file tariffs showing rates for intrastate trucking operations (A-2; A-8).

15. Intrastate truckers in California must file quarterly reports of gross intrastate operating revenue and pay a fee which, for the fiscal year 1989-90, amounted to two-tenths of one percent of gross operating revenue. Federal Express has refused to pay this fee (A-11). (The Transportation Rate Fund Fee is now one-half of one

percent of gross operating revenue. Cal. West's Ann. Pub. Util. Code § 5003.2.)

These are examples of requirements that the California Commission has imposed on every trucker, including Federal Express, for its intrastate trucking operations in California.

The CTA is not contending in any way that all of the requirements of the California Commission are appropriate or necessary in the present day business world. In fact, on various occasions, the CTA and its members have either sought to change the regulations or be relieved from their application. But the fact remains that these requirements exist and, in the absence of a variance or other relief, all intrastate carriers must comply with them and bear the expense of doing so. However, Federal Express cavalierly contends that these same requirements should not apply to its intrastate truck operations which, it admits, compete with other carriers. (The California regulations "prevent Federal Express from competing by attempting to get new business from our competitors" (A-4).)

The funding that underwrites the California Commission's carrier regulation program is derived almost exclusively from the quarterly operating fees paid by the carriers themselves. Cal. West's Ann. Pub. Util. Code §§ 5001-5011. Approximately 23,000 quarterly report forms for determining these fees are sent to California intrastate carriers, many of which are members of the CTA (A-11). Allowing Federal Express to avoid payment results in proportionately larger payments from other carriers and allows Federal Express to be the beneficiary of the regulatory order established by the Commission in California without paying its fair share for that benefit.

Members of the CTA and other regulated intrastate carriers in California cannot compete with the unregulated intrastate trucking service of Federal Express which does not bear the added cost of California regulation and which is under no regulatory restraint to prevent it from undercutting rates to steal customers from carriers which must comply with Commission requirements.

The Declaration of Policy of the Airline Deregulation Act of 1978, as amended, provides that the following, among other things, are in the public interest and in accordance with the public convenience and necessity (49 U.S.C. App. § 1302(a)):

> (7) The prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation, and the avoidance of —
>
> (A) unreasonable industry concentration, excessive market domination, and monopoly power; and
>
> (B) other conditions;
>
> that would tend to allow one or more air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation.

In addition to the above, the following, among other things, is considered to be in the public interest in respect to all-cargo air service (49 U.S.C. App. § 1302(b)):

> (3) The provision of services without unjust discriminations, undue preferences or advantages, unfair or deceptive practices, or predatory pricing.

It is clear that one of the main purposes of the Airline Deregulation Act is to create an environment where all carriers are able to compete for business on an equal basis without any unfair, anticompetitive practices. The fact that Congress has gone to special lengths to preclude anticompetitive practices in the Act is clear evidence that Congress did not intend that the federal preemption section of the same Act, 49 U.S.C. App. § 1305(a)(1), would allow an intrastate trucker in California to have such a competitive advantage in the market merely because it was also an air carrier.

The dissenting opinion in the Ninth Circuit aptly recognizes the effect of applying the preemption to the intrastate ground operations of Federal Express (936 F.2d at 1081):

> [T]he majority's decision will free the trucking business of Federal Express from any state economic regulation. This will open the door for substantial increases in Federal Express's trucking business and give it a substantial competitive advantage over trucking companies that must comply with state regulation . . .

Congress never intended this effect.

CONCLUSION

The Ninth Circuit has improperly extended the federal preemption in the Act to intrastate trucking, an area of regulation which continues by federal statute to be reserved to the states. The Court failed to take into account that the purpose of preemption under the Airline Deregulation Act was to prevent states from enacting laws and regulations to fill the void left by the elimination of federal regulation. Its purpose was not to make inapplicable long-standing state regulation in an area which has never been subject to federal regulation.

The impact of the Ninth Circuit decision on existing regulated California intrastate carriers will be devastating where they are now compelled to compete with an unregulated carrier the size of Federal Express.

The Court should grant the petition for certiorari filed by the California Public Utilities Commission and thereafter reverse the United States Court of Appeals for the Ninth Circuit.

Dated: November 21, 1991.

Respectfully submitted,

JOHN C. RUSSELL
Counsel of Record

RUSSELL, HANCOCK
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CALIFORNIA TRUCKING ASSOC.

APPENDIX

CR 19, pp. 8-9

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FILED
December 9 - 1987
William L. Whittaker
Clerk, U.S. District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL EXPRESS CORPORATION,
Plaintiff,
v.
CALIFORNIA PUBLIC UTILITIES COMMISSION; STANLEY W. HULETT; DONALD VIAL; FREDERICK R. DUDA; JOHN B. OHANIAN; G. MICHAEL WILK; VICTOR WEISER and NORMAN KELLEY,
Defendants.

No. C 87 4891 MHP

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (CONSTITUTIONALITY OF STATE REGULATION OF FEDERALLY CERTIFIED ALL CARGO AIR CARRIER)

Plaintiff FEDERAL EXPRESS CORPORATION ("FEDERAL EXPRESS") complains of the defendants as follows:

* * * * * * *

18. Plaintiff attempted to avoid the constitutional dispute and filed a tariff reflecting its nationwide rates with the PUC effective January 1, 1985. The tariff does not comply with the rules and regulations of the PUC because:

(a) Plaintiff's nationwide rates provide a guaranteed *refund* of charges if the package is not delivered on time or if package status information cannot be obtained within 30 minutes, and such promise is an illegal rebate under the PUC's rules and regulations;

(b) Plaintiff's nationwide rates provide a *volume discount* for its regular customers regardless of distance, whether the packages travel solely by aircraft, by aircraft and motor carrier, or solely by motor carrier, and regardless of destination in the United States, and such volume discount has not been cost-justified to the PUC;

(c) Plaintiff's nationwide *uniform rates* which depend upon the size and weight of each package, and not upon distance, violate the PUC's rule and regulations; and

(d) Under the PUC's rules and regulations, plaintiff may not reduce rates to meet competition without showing that the reduced rates are cost-justified, and plaintiff cannot make such a showing.

CR 46, Ex. 2, pp. 2-3

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL EXPRESS CORPORATION,
Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION; STANLEY W. HULETT; DONALD VIAL; FREDERICK R. DUDA; JOHN B. OHANIAN; G. MICHAEL WILK; VICTOR WEISER and NORMAN KELLEY,
Defendants.

No. C 87 4891 MHP
DECLARATION OF LAURIE A. TUCKER

Laurie A. Tucker declares as follows:

1. I am the Manager of Pricing Analysis and Administration and Customer Automation and Invoicing for Federal Express Corporation ("Federal Express") . . . .

* * * * * * *

5. I have been advised that the California Public Utilities Commission (PUC) requires a regulated carrier to file all contracts with customers and offer the same discount and the same price or service arrangement to all customers who are similarly situated. Since all of our customers' contracts, discounts, service agreements, credit terms, etc., apply to shipments regardless of where made, each of those agreements would have to be filed with the Public Utilities Commission.

6. [A]ny requirement that we file cost justification for the price offered would divulge Federal Express' trade secrets concerning costs, deliveries, wage rates, etc.

7. I am told that if we wish to compete with a package carrier, we may not meet the rate being offered by that carrier if it is contained in a contract or contract rate schedule (General Order 147-A, Rule 7.5). I am also told that we will not be able to reduce a rate to meet the rate of a competing carrier unless we certify that we are already handling the traffic in question (Rule 7.5(c)(5)). These rules prevent Federal Express from competing by attempting to get new business from our competitors. Preventing Federal Express from competing and attempting to obtain business presently handled by other carriers in California will affect our ability to grow, become more profitable and provide better service to our customers throughout the United States. . . .

CR 46, Ex. 12, p. 2

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FEDERAL EXPRESS CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL EXPRESS CORPORATION,
Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION; STANLEY W. HULETT; DONALD VIAL; FREDERICK R. DUDA; JOHN B. OHANIAN; G. MICHAEL WILK; VICTOR WEISER and NORMAN KELLEY,
Defendants.

No. C 87 4891 MHP
DECLARATION OF THOMAS L. McNEAL

Thomas L. McNeal declares that the following is true and correct.

1) I am employed as Managing Director, Treasury and Credit Operations of Federal Express Corporation ("Federal Express"). . . .

* * * * * * *

3) I have been advised that the California Public Utilities Commission (PUC) has issued a general order

which requires that all bills must be presented within 7 days from delivery and credit may only be extended for 7 days. If we were to impose those conditions upon our customers, it is my opinion that we would lose many of our customers because those credit conditions are far more stringent than presently exist in the market place. I cannot estimate the loss, but it would be substantial.

CR 72, Ex. 4F, pp. 3, 7

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL EXPRESS CORPORATION,
Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION; STANLEY W. HULETT; DONALD VIAL; FREDERICK R. DUDA; JOHN B. OHANIAN; G. MICHAEL WILK; VICTOR WEISER and NORMAN KELLEY,
Defendants.

No. C 87 4891 MHP
DEFENDANTS' RESPONSES TO PLAINTIFF'S REQUESTS FOR ADMISSIONS

* * * * * * *

REQUEST NO. 3: Admit that even if the CPUC allows Federal Express to estimate the number of packages that have moved solely on the ground, solely within California after transportation of the packages, the CPUC would not relieve Federal Express from complying with PUC

General Order 155 requiring the retention of records in California for three years.

RESPONSE TO REQUEST NO. 3: While the mere fact that the CPUC allows Federal Express to estimate its volume of wholly intrastate ground traffic would not of itself nullify other CPUC requirements, it is very likely that Federal Express could obtain a variance from the requirement in General Order 155 regarding the retention of records in California for three years if that requirement were shown by plaintiff to be burdensome or detrimental to the Federal Express mode of operation.

* * * * * * *

REQUEST NO. 9: Admit that even if the CPUC allows Federal Express to estimate the number of packages that have moved solely on the ground, solely within California after transportation of the packages the CPUC would not relieve Federal Express from complying with PUC General Order 80-B requiring the filing of tariffs showing all services, rates, and terms of carriage for all customers who ship packages from a point of origin in California to a destination in California.

RESPONSE TO REQUEST NO. 9: While the mere fact that the CPUC allows Federal Express to estimate its volume of wholly intrastate ground traffic would not of itself nullify other CPUC requirements, it is very likely that Federal Express could obtain a variance from the requirement in General Order 80-B requiring the filing of tariffs showing all services, rates and terms of carriage for all customers who ship packages from a point of origin in California to a destination in California if this requirement were shown by plaintiff to be burdensome or detrimental to the Federal Express mode of operation.

CR 72, Ex. 4H, pp. 2-3, 5-6, 7

BURDENS IMPOSED BY PUC ON INTERSTATE COMMERCE*

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* Excerpts from declarations by Federal Express employees previously filed.

WITNESS	BURDEN	EXCERPTS FROM DECLARATIONS
Laurie A. Tucker Manager of Pricing Analysis and Administration and Customer Automation and Invoicing Declaration of August 26, 1988	Loss of pricing flexibility for all customers.	¶ 7 I am told that if we wish to compete with a package carrier, we may not meet the rate being offered by that carrier if it is contained in a contract or contract rate schedule (General Order 147-A, Rule 7.5). I am also told that we will not be able to reduce a rate to meet the rate of a competing carrier unless we certify that we are already handling the traffic in question (Rule 7.5(c)(5)). These rules prevent Federal Express from competing by attempting to get new business from our competitors. Preventing Federal Express from competing and attempting to obtain business presently handled by other carriers in California will affect our ability to grow, become more profitable and provide better service to our customers throughout the United States. . . .

	Forcing interstate shippers to pay different California rates.	¶ 8 [W]e are unable to determine whether a package will be shipped wholly via aircraft, partially via aircraft and truck, or wholly via truck. Accordingly, the interstate [*sic*] rate required by the Public Utilities Commission will be charged for *all* interstate shipments, whether by air or by truck.
Doug Lawrence Manager of Information Air Systems Air/Ground Terminals and Transportation Declaration of August 25, 1988	Slowdown in package movement for interstate shippers to accommodate extra scanning.	¶ 5 There is no known system to permit Federal Express to determine whether a package which is received for shipment will be transported by truck or by air. Although Federal Express does not have the ability to determine, after transportation, which packages have been transported by truck, it is conceivable to scan trucks which are unloading to record which packages are in the truck. That scanning would add precious minutes to the time required to unload a truck. . . .

Gayle M. Christensen Managing Director of Servicing Marketing Declaration of August 26, 1988	Forcing interstate shippers to use California air-bills.	¶ 4 If we were required to be in compliance with the requirements of General Order 155, Federal Express would have to add the Federal Express phone number and CAL-T number to its air waybill. There is no room on the front of the air waybill, but these two numbers could be entered on the back of the air waybill on the shipper's and recipient's copy.
W. Bruce Allen Professor of Public policy and Management and Regional Science and Transportation at the Wharton School of the University of Pennsylvania; Director of the Wharton Transportation Program; Chairman of the Department of Public Policy and Management; Chairman of the Graduate group in Transportation	Increased national operating costs to comply with intra-state regulations.	¶ 8 I am also aware of the declarations indicating the changes necessary to the Federal Express accounting and billing procedures to comply with the PUC orders, and the added costs of attempting to comply with those orders. These are identifiable incremental costs. It is my understanding that there are other costs that are unknown at this time because they would be incurred jointly in both intrastate and interstate markets.

Declaration of August 26, 1988	Forcing interstate shippers to pay for higher costs incurred in California.	¶ 9 Any cost increases will be shared by Federal and its customers of both intrastate *and* interstate shipments. Federal's sales will fall and consumers will pay more for Federal service if the company is able to pass the cost increases onto consumers. Federal's profitability will be harmed as will its ability to compete to the extent it cannot pass on the cost increases.
<u>Michael C. Shermer</u> Managing Director of Risk Management Declaration of August 26, 1988	Requirement for interstate shippers to make written not telephone claims.	a) We do not require that claims be in writing, and it would greatly inconvenience our customers, especially commercial customers, to require that all claims be made in writing. . . .
<u>Charles A. Germano</u> Managing Director, Billing Services Support Declaration of August 25, 1988	Requirement for interstate shippers to file written refund claims, instead of making oral claims.	¶ 5 I am advised that the California Public Utilities Commission General Orders require the customer to file all such [refund] claims in writing, which claim must include the original air bill, the amount sought to be claimed and other pertinent information. . . .

Additional personnel and additional cost of $350,000 to process written claims from California shippers.	¶ 6 Creating such documentation would be an administrative burden upon our department. . . . We would obviously be required to create space to store such written documents. Also, if we were to require each claim to be in writing, create a file for each claim, and acknowledge each claim in writing, I believe we would be required to employ at least an additional 12 people in our department. . . .

CR 75, p. 2

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL EXPRESS CORPORATION,
Plaintiff,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION; STANLEY W. HULETT; DONALD VIAL; FREDERICK R. DUDA; JOHN B. OHANIAN; G. MICHAEL WILK; VICTOR WEISER and NORMAN KELLEY,
Defendants.

No. C 87 4891 MHP
AFFIDAVIT OF JAMES DIANI
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF)
SAN FRANCISCO)

JAMES DIANI, being first duly sworn, on oath deposes and says:

1. He is a supervisor in the Tariff and License Branch of the Transportation Division of the California Public Utility Commission ("CPUC").

* * * * * * * *

3. The unit which he supervises in the Tariff and License Branch is responsible for collecting CPUC quarterly operating fees (also known as "Transportation Rate Fund Fees") from motor vehicle carriers operating in California.

4. Four times each year his unit mails out a "Quarterly Report of Gross Operating Revenues" to each California carrier and audits the returns. Approximately 23,000 of these quarterly report documents are mailed each quarter by his unit.

5. Pursuant to Section 5003.1(a) of the California Public Utilities Code, quarterly fees may be set each fiscal year at less than one-third of one percent of highway carriers' gross operating revenues. For non-exempt carriers, such as plaintiff, the current fee and the fee proposed for Fiscal Year 1989-90 is set at two-tenths of one percent of gross operating revenue.

(7)

No. 91-502

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,
Petitioners,

VS.

FEDERAL EXPRESS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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November 26, 1991

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No. 91-502

In the Supreme Court

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THE PUBLIC UTILITIES COMMISSION OF
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FEDERAL EXPRESS CORPORATION,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

ARGUMENT

I

PETITIONERS' CONSTRUCTION FLOWS NATURALLY FROM THE STATUTORY LANGUAGE

Federal Express argues that the preemption language of the Airline Deregulation Act ("ADA"), 49 U.S.C. App. § 1305(a)(1), bars state regulation of *all* its operations, "not just . . . its aircraft operations." Br. in Opp. 7. It contends that "[t]he ADA simply does not contain the limiting words that petitioner seeks to insert." *Id.* To the contrary, however, the plain words "relating to rates, routes, or services of any air carrier" bear the obvious and natural implication that Congress was referring to an airline's "rates, routes, or services" as an air carrier, *i.e.*, its "rates,

routes, or services" in the provision of air transportation. The limitless construction urged by Federal Express flies in the face of both "the context of other laws into which the statute fits," A-4,[1] and the fundamental presumption "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Indeed, the primary contention in Federal Express's brief — that the company's purely intrastate, truck-only operations are an "integral" and indivisible part of its air transportation operations — implicitly accepts the very construction of the statute tendered by petitioners.

II

FEDERAL EXPRESS'S "INTEGRATION" ARGUMENT FINDS NO SUPPORT IN THE STATUTE OR THE FACTS OF THE CASE AND PROVIDES NO WORKABLE STANDARD FOR THE RESOLUTION OF OTHER CASES

Federal Express's "integration" argument is rife with problems. In the first place, like the majority opinion, it "never explains how the carriage of goods by land is somehow transformed into the carriage of goods by air." A-9 (footnote omitted). In this respect, its argument is largely beside the point, because it focuses on precisely those intermodal air *and* ground operations which California does not propose to regulate.[2] When the focus is redirected toward those intrastate, truck-only operations over which California asserts regulatory authority — the operations that are at issue in this case — the claim of "integration" dissolves. As found by the District Court, Federal Express's ground operations may be "commercially linked to its air transportation system, [but] its

---

[1]As herein used, page references in which numerals are preceded by letters refer to pagination in the appendix to the petition for certiorari.

[2]California has repeatedly conceded that when air and ground operations are *truly* integrated, *i.e.*, when the air carrier transports the packages both by airplane *and* by truck, the state is preempted.

hauling operations are not substantially different from services provided by other [non-air] motor carriers." B-6.

The validity of petitioners' distinction is underscored by Federal Express's shallow analysis of the anticompetitive impacts of the Ninth Circuit's decision. Br. in Opp. 13-14. Federal Express fails to grasp that while its air and air/ground operations may compete with the operations of other air carriers, its intrastate, truck-only operations compete with the operations of intrastate motor carriers regulated by the state. Federal Express's unstated assumption is either the pretense that such intrastate motor carriers don't exist or the notion that Congress, in deregulating airlines, intended to put those intrastate motor carriers out of business. *See* Br. of California Trucking Ass'n as Amicus Curiae in Support of Petitioners filed herein Nov. 22, 1991. Indeed, even to the extent that there may exist other certificated air carriers who also have intrastate trucking operations, Federal Express's "integration" argument seeks to place the burden on each to demonstrate in lengthy court proceedings that its operations are sufficiently "integrated" to qualify for immunity from state regulation. Thus while Federal Express's "integration" argument, if accepted, would certainly benefit Federal Express, it is difficult to see how it would benefit fair competition.

Nor is Federal Express's "integration" argument supported by the record. Among the "'undisputed' facts," Br. in Opp. 5, *quoting* A-2-3, on which this case rests is the fact that the packages which the state seeks to regulate are segregated by Federal Express sorters for regularly-scheduled ground-only transportation within the state pursuant to a conscious company policy. F-2-6.[3] Thus the District Court correctly found that Federal Express has presented not a shred of evidence that it is

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[3]For example, the five Federal Express trucks that travel between Los Angeles and the San Francisco Bay Area do so on a daily basis at scheduled departure times — not, as Federal Express implies, only when the weather is bad or a plane has mechanical problems. F-2.

"an 'integrated air-ground system' whose operations should be considered under the single rubric of air carrier." B-9.[4]

Moreover, Federal Express has presented no evidence that the "preemption rule urged by petitioner would plainly undermine the efficiency and effectiveness of [Federal Express's] national air cargo system." Br. in Opp. 8. California has conceded not only that Federal Express will be accorded variances from regulatory requirements which it shows to be unduly burdensome but also that the state is willing to base its regulation on "estimates of the number of packages shipped by Federal Express solely by ground transportation in California." C-4.[5]

Federal Express relies heavily on language in 49 U.S.C. App. § 1302(b), *see* D-3, which articulates the policy of promoting the development of "an expedited all cargo *air* service system" (emphasis added) and "an integrated transportation system," but the legislative history of that section, not discussed by Federal Express, suggests that the service/system referred to involves "the transportation of property . . . by all-cargo aircraft or combination [cargo and passenger] aircraft," not transportation solely by truck. *See* H. Conf. Rep. No. 95-373, 95th Cong., 1st Sess. 14, *reprinted in* 1977 U.S. Code Cong. & Admin. News 3396, 3399.

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[4]Federal Express also rests its "integration" argument on the majority's assertion that "[e]very [Federal Express] truck carries packages that are in interstate commerce by air." Br. in Opp. 5, *quoting* A-5. However, 49 U.S.C. § 10528 makes clear that Congress did not intend that the commingling of jurisdictionally-diverse packages on a single truck would alter the jurisdictional nature of the individual packages shipped. The contrary rule urged by Federal Express would undercut the clearly-articulated federal policy of maximizing the usage of motor carrier equipment to increase economic efficiency. *See* H. Rep. No. 96-1069, 96th Cong., 2d Sess. 34, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2283, 2316.

[5]This latter concession hardly seems necessary, for Federal Express has recently made public its state-of-the-art package tracking ability which would presumably enable it to identify with precision and with little effort those packages which move purely intrastate and exclusively by truck. *See* Am. Mgt. Ass'n Briefing, *Blueprints for Service Quality: The Federal Express Approach* (Am. Mgt. Ass'n N.Y. 1991), at 59.

Moreover, Federal Express's analysis assumes that § 1302(b) was enacted as private legislation for the company's sole benefit. However, on the face of the statute it is clear that Congress was referring to the development of a single nationwide all-cargo air transportation system combining the services of many different air transportation providers, not a single private company. *See* §§ 1302(b)(1) (referring to "the encouragement and development of *an* expedited all-cargo air service system") (emphasis added) and 1302(b)(2) (referring to "the encouragement and development of *an* integrated transportation system") (emphasis added).[6]

Perhaps most importantly, the "integration" standard urged by Federal Express is inappropriate because it rests on a slippery slope. One can envision airlines contending that their frequent flyer credit card operations are "integral" to their air transportation services. From there, it is but a small leap to argue that other non-air-transportation activities are "integral" as well. The potential for pretextual claims of "integration" and burdensome case-by-case litigation to give content to the standard is limited only by the imagination of the air carrier involved.

III

THE OVERBREADTH AND NATIONWIDE IMPLICATIONS OF THE MAJORITY'S RATIONALE WARRANT THE COURT'S PLENARY REVIEW

Federal Express characterizes the issue presented as a narrow one. Br. in Opp. 9-14. At bottom line, however, the Ninth Circuit

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[6]*See also* § 1302(b)(3), requiring the Civil Aeronautics Board to consider in its certificate decisions "[t]he provision of services without unjust discrimination, undue preferences or advantages, unfair or deceptive practices, or predatory pricing" — a difficult assignment when the CAB does not regulate the provision of the intrastate motor carrier services with which Federal Express is attempting to compete. *See also* § 1302(a), which refers repeatedly to the ADA's policies of facilitating competition in "*air* transportation" (emphasis added) and "*air* transportation services" (emphasis added) and of prohibiting anticompetitive practices.

majority has articulated an unduly expansive reading of § 1305(a)(1). By focusing on an airline's status as an "air carrier" rather than on the nature of the activities sought to be regulated by the state, the majority's opinion can be read as immunizing from state regulation virtually all non-air-transportation business activities of air carriers. This is so because the majority opinion appears to equate the statutory words "regulation . . . relating to rates, routes, or services of any air carrier" with any regulation which "bear[s] on price" or "affect[s] the price" or "determine[s] cost." A-6.[7] Such a broad reading of the statute creates a potentially insurmountable hurdle to state regulation of any of the business activities of air carriers.[8]

California's concern about the overbreadth of the majority's holding is neither a "mischaracterization" (Br. in Opp. 9) nor alarmist. The construction feared by California is recognized as a possible reading of the majority opinion by the dissent (*see* A-9-10, text and nn. 4, 6), by the Solicitor General of the United States (*see* Br. for the United States as Amicus Curiae, *Morales,*

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[7]Notably, no discussion of this portion of the Ninth Circuit's rationale—the majority's precise definition of "terms of service" and hence "economic regulation"—appears in Federal Express's brief.

[8]Perhaps nowhere is the shallowness of Federal Express's analysis as apparent as in its discussion of public safety. Br. in Opp. 14. The company asserts that the majority opinion draws a clear line between state regulation "of the safety features of Federal Express's trucks and the safety standards applicable to its drivers" (which is permissible) and state regulation of its "rates and terms of service" (which is preempted). *Id.* However, it ignores the fundamental inconsistency in its analysis; since under the majority opinion the phrase "terms of service" includes anything which "bear[s] on price" or "affect[s] the price" or "determine[s] cost," A-6, the argument is available that safety regulation (which bears on cost), as well as the regulation of any non-air-transportation activities the company chooses to enter into, is preempted. Notably, Federal Express nowhere explicitly embraces California's argument that the company is subject to licensing, insurance and fee requirements related to safety as well as possibility of license revocation for violation. Without these tools, a state's efforts to assure trucking safety on its highways would be thwarted.

et al. v. *Trans World Airlines, Inc., cert. pending* Nos. 90-1604, *et al.*, filed Oct. 24, 1991, at 13-14), by the Attorneys General of forty-six of the fifty States of the Union (*see* Br. Amicus Curiae of Forty-Six States in Suppt. of Petitioners filed herein Nov. 22, 1991, at 4, 6-7, 10-11), by the National Association of Regulatory Utility Commissioners (*see* Br. of the NARUC as Amicus Curiae in Suppt. of Petitioners filed herein Nov. 22, 1991), and by the nation's largest motor carrier employee union (*see* Br. Amicus Curiae of the Int'l Brotherhood of Teamsters in Suppt. of Petitioners filed herein Nov. 22, 1991).

The entry of airlines into non-air-transportation business activities as a result of the special immunity from state regulation conferred by the majority opinion is by no means farfetched. Airlines presently can, and in many instances do, offer credit card services in connection with their frequent flyer programs, as well as flight, baggage and travel insurance services, car rental services, hotel, restaurant and alcoholic beverage services and travel/tour package and booking services, among others. It is no great leap to assume that if such companies are immunized from state regulation in areas traditionally regulated by the states solely because of their air carrier status, they would have a strong incentive to broaden significantly their non-air-transportation business activities to exploit the unfair competitive advantage conferred upon them by the majority. The use of an air carrier certificate as a shield from legitimate state regulation or as an invitation to engage in anticompetitive conduct is hardly what Congress intended when it enacted § 1305(a)(1).

The extreme overbreadth of the majority's rationale makes this case an appropriate vehicle for initial review of the preemptive reach of § 1305(a)(1). By first clarifying whether Congress intended to immunize from state regulation the activities of air carriers having little or no relationship to the provision of air transportation, the Court would be establishing an analytical framework from which to address narrower questions, such as whether Congress intended to allow air carriers to violate state consumer fraud laws with impunity, *see Morales, supra*, or whether Congress intended to immunize the conduct of air carriers toward their passengers from state compensatory or

punitive damages remedies, *see West v. Northwest Airlines, Inc.*, *cert. pending* No. 91-505, *cross-pet. for cert. pending* No. 91-734.

CONCLUSION

The Court should grant certiorari and set the cause for briefing and oral argument.

Respectfully submitted,

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November 26, 1991

(8)

No. 91-502

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,
Petitioners,

VS.

FEDERAL EXPRESS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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October Term, 1991

The Public Utilities Commission of the State of California, et al.,
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vs.

Federal Express Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

SUPPLEMENTAL STATEMENT

On September 23, 1991, the California Public Utilities Commission ("CPUC") filed its petition for certiorari herein.

On November 22, 1991, respondent Federal Express Corporation filed its brief in opposition. On that same day, amicus curiae briefs in support of the petition were filed by forty-six of the fifty States, the National Association of Regulatory Utility Commissioners ("NARUC"), the California Trucking Association ("CTA") and the International Brotherhood of Teamsters ("IBT").

On November 27, 1991, the CPUC filed its reply to the brief in opposition. On that same day, the Court granted certiorari in

Morales v. Trans World Airlines, Inc., No. 90-1604. The CPUC's petition was held pending decision in *Morales*.

On June 1, 1992, the Court rendered its decision in *Morales*. The CPUC's petition for certiorari is now set for conference on June 5, 1992.

ARGUMENT

I

THE QUESTION HERE IS DISTINCT FROM THAT IN *MORALES* AND A REMAND WILL ONLY DELAY ITS FINAL RESOLUTION

The Court should grant certiorari and set the cause for briefing and oral argument because a remand to the Ninth Circuit for reconsideration in light of *Morales* is unlikely to serve any purpose save delay.

The question here is whether the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C App. § 1305(a)(1), immunizes an "air carrier"—defined as "any citizen . . . who undertakes . . . to engage in air transportation," 49 U.S.C. App. § 1301(3)—from state regulation of highway transportation activities having nothing to do with the provision of air transportation. This question is distinct from that in *Morales*, which involved the ADA's preemptive effect on state regulation of airline advertising. As the Court's decision in *Morales* makes clear,

> "some state actions may affect [airline fares] in too tenuous, remote or peripheral a manner to have pre-emptive effect. [*Shaw v. Delta Air Lines*, 463 U.S. 85 (1983),] 463 U.S., at 100, n. 21. In this case, as in *Shaw*, "the present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line." *Ibid.*

Slip op. at 14. *Morales* simply does not resolve the issue presented in this case.[1]

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[1] The United States argued for preemption in *Morales* but cited legislative history which supports the CPUC here. It said:

The parties have conceded that the question is distinct from that in *Morales*. Pet. 6 n. 5; Br. in Opp. 11; Repl. to Br. in Opp. 7. This distinctness is a primary reason why forty-six States have urged the Court to "grant certiorari with full briefing and oral argument *both* in the *TWA* cases *and* in the instant case," Br. Amicus Curiae of Forty-Six States in Suppt. 13-14 (emphasis added), and why the IBT has argued that "this case merits the attention of the Court *even more* [than *Morales*]," Br. Amicus Curiae of IBT in Suppt. 18 (emphasis added).[2]

> [The ADA] "entirely overhaul[ed] the *aviation* regulatory system." H.R. Conf. Rep. No. 1779, 95th Cong. 2d Sess. 56 (1978). [ ] The Act's ambitious objective was "to encourage, develop, and attain an *air transportation* system which relies on competitive market forces to determine the quality, variety, and price of *air* services[.]" H.R. Conf. Rep. No. 1779, *supra*, at 53.

Br. for United States as Amicus Curiae Supp'ting Resp'ts, *Morales v. Trans World Airlines, Inc.* No. 90-1604 (filed Feb., 1992), at 9 (emphasis added).

[2] In *Morales* thirty-one States stressed the extreme importance of the Court's speedy review of the instant case:

> Questions concerning the scope of § 105's language and the states' ability to exercise their traditional police powers are not limited to this case alone. *See, e.g., Federal Express Corp. v. California Public Utilities Comm'n,* 936 F.2d 1075 (9th Cir. 1991), *petition for cert. pending,* No. 91-502. That matter raises important issues which, though *distinct* from those raised in the case *sub judice,* also question what aspects of airline activities Congress meant to preempt when it enacted § 105 of the ADA. Because of the significant implications for the enforcement of state laws which provide for highway safety and fair competition, as well as the disruptive impact to the various motor carrier regulatory programs of the states, forty-six states, as *amici curiae,* have asked this Court to review No. 91-502 so that it may provide, *without delay,* guidance on the separate issue of the preemptive effect of § 105 in the circumstances of that case.

Br. of Thirty-one State Att'ys Gen'l Resp'd'ts in Suppt. of Petitioner, *Morales v. Trans World Airlines, Inc.*, No. 90-1604 (filed Jan. 10, 1992), at 16 n. 3 (emphasis added).

Because of the distinctness of the issues, it is extremely unlikely that the Ninth Circuit will alter its decision in light of *Morales*. The Ninth Circuit majority has already resisted the persuasive force of an articulate dissent which, unlike *Morales*, directly addresses the issue presented in this case. Moreover, even if the Ninth Circuit were to alter its decision on remand, the losing party will inevitably return the issue to this Court for resolution.

The issue is ripe for review now. The same reasons for reviewing the case that existed in November, 1991, exist now. The Court should grant certiorari and set the cause for briefing and oral argument.

II

A REMAND IN LIGHT OF *MORALES* IS INAPPROPRIATE WHERE THE U.S. GOVERNMENT HAS ACKNOWLEDGED THAT THE ADA DOES NOT PREEMPT STATE REGULATION OF THE INTRASTATE TRUCKING OPERATIONS OF AIR CARRIERS

A remand for reconsideration in light of *Morales*—the applicability of which is tangential at best—is inappropriate where the U.S. Department of Transportation, addressing the precise issue presented in this case, has acknowledged that the CPUC's argument is correct.

The CPUC has only recently learned that in a Report to Congress, *Impact of State Regulation on the Package Express Industry*, DOT-P-16 (Sept. 1990), the DOT acknowledged that preempting state regulation of "all surface package express . . . [or] surface transportation movements by air carriers" would "*require* legislation." *Id.*, at 52, 53-54 (emphasis added). The DOT stated that Congress would have to *amend* 49 U.S.C. App. § 1305(a)(1) to accomplish this objective. *Id.*, at 53. The DOT thus acknowledged that the ADA, as presently written, does not evince the requisite clear and manifest congressional intent to

preempt state regulation of the intrastate trucking activities of air carriers.[3]

III

DELAY IN THIS COURT'S RESOLUTION OF THE QUESTION WILL CAUSE GREAT HARM

The uncertainty created by the Ninth Circuit's decision has disrupted state economic, safety and insurance regulation in California and elsewhere. It has also engendered severe and ongoing anticompetitive harm to the many non-air-carrier trucking companies with which Federal Express's intrastate truck-only operations now compete. These harms will continue unabated until the Ninth Circuit's decision is overturned by this Court. Br. Amicus Curiae of Forty-six States in Suppt. 3, 6; Br. Amicus Curiae of NARUC in Suppt. 8, 10, 16; Br. Amicus Curiae of IBT in Suppt. 5, 11, 16; Br. Amicus Curiae of CTA in Suppt. 4-5, 16; *see also* Note 2, *supra*.

The Court's guidance is urgently needed now.

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[3] DOT recommended *against* Congress's enacting such legislation because it "would place all other types of carriers that provide intrastate express package . . . [or] trucking service at a competitive disadvantage," *id.*, at 53-54, and because it would be "bad economics," *id.*, at 58.

CONCLUSION

The Court should grant certiorari and set the cause for briefing and oral argument.

Respectfully submitted,

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No. 91-502

IN THE

Supreme Court of the United States

October Term 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PATRICIA M. ECKERT, G. MITCHELL WILK, JOHN B. OHANIAN, DANIEL WM. FESSLER, NORMAN D. SHUMWAY, NEAL J. SHULMAN, and WILLIAM R. SCHULTE,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* WITH BRIEF *AMICUS CURIAE* SUPPORTING PETITION FOR CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-502

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PATRICIA M. ECKERT, G. MITCHELL WILK, JOHN B. OHANIAN, DANIEL WM. FESSLER, NORMAN D. SHUMWAY, NEAL J. SHULMAN, and WILLIAM R. SCHULTE,

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MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE SUPPORTING PETITION FOR CERTIORARI

The National Association of Regulatory Utility Commissioners (NARUC) hereby respectfully moves for leave to file the

accompanying brief as amicus curiae. The written consent of the Petitioner has been obtained and filed with the Clerk of the Court. The Respondent has not consented.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States engaged in the economic and safety regulation of carriers and utilities. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating, inter alia, the intrastate rates and services of for-hire transportation companies -- trucks, buses, taxis and railroads -- operating within their respective jurisdictions. These officials have the obligation under State law to assure the establishment and maintenance of

intrastate transportation services as may be required by the public convenience and necessity, and to ensure that such services are safely provided at rates and conditions which are just, reasonable, and nondiscriminatory for all intrastate shippers and receivers.

In this case, the Public Utilities Commission of the State of California (CPUC), a member commission of the NARUC, has asked this Court to review a decision of a divided panel of the United States Court of Appeals for the Ninth Circuit, which held that the CPUC's authority to regulate the intrastate movement of packages by trucks operated by an air cargo company -- Federal Express Corporation -- was preempted by Federal statute. Specifically, the panel majority determined that under section 105 of the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. App. sec. 1305(a) (1988), the Congress had prohibited not only State

regulation of air transportation services, but also all CPUC regulation of intrastate truck transportation by Federal Express. According to the panel majority, because Federal Express's inter and intrastate <u>air</u> services are beyond State regulatory authority, the carrier's intrastate <u>truck</u> service is free from State regulation as well.

The Court of Appeals' erroneous construction of the scope of preemption under the ADA will have serious consequences for the regulatory policies and procedures of each of the NARUC's member commissions that regulate intrastate trucking operations of air express companies like Federal Express. In addition, as Judge Singleton described in dissent below, the panel majority's opinion provides no clear way to determine which services or business activities conducted by an air carrier such as Federal Express are subject to State

regulation, including services far removed from air transportation of packages. Left unreviewed, the decision of the Court below greatly restricts, and indeed could eliminate, State regulation of the licensing and safety aspects of Federal Express's vehicle operations, as well as other aspects of the company's business wholly unrelated to air express service and the preemptive purposes of the Airline Deregulation Act.

Therefore, we believe that the amicus participation of a national organization such as the NARUC, which represents each of the State agencies exercising jurisdiction over intrastate transportation services, is justified in this case. Accordingly, to represent the collective interest of its members in preserving their lawful authority to protect the public interest in safe and fair truck transportation, the NARUC respectfully requests that the accompanying brief be accepted for filing.

Respectfully submitted,

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Petitioners,

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FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) submits this

brief as amicus curiae urging that certiorari be granted due to the substantial harm the decision below will have upon the regulation of intrastate motor carriers by its member State regulatory commissions.

As described in the preceding motion, the NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands engaged in the regulation of utilities and carriers. The California Public Utilities Commission (CPUC), Petitioner herein, is a member commission of the NARUC. The individual commissioners of the CPUC, also Petitioners herein, are NARUC members. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

In the decision for which the CPUC seeks this Court's review, Federal Express Corp. v. Pub. Util. Comm'n of California, a divided panel of the United States Court of Appeals for the Ninth Circuit reversed a decision of the United States District Court for the Northern District of California, which held, inter alia, that the CPUC's authority to regulate intrastate motor carrier service provided by the Federal Express Corporation (Federal Express) was not preempted by section 105 (a)(1) of the Airline Deregulation Act of 1978, as amended, 49 U.S.C. App. sec. 1305 (a)(1) ("the ADA").[1] By its decision, the panel

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[1] The majority and dissenting opinions of the Court of Appeals panel (Petitioners' Appendix A) are reported at 936 F.2d 1075 (9th Cir. 1991). The decision of the District Court on the question of preemption under the ADA (Petitioners' Appendix B) is reported at 716 F. Supp. 1299 (N.D. Cal. 1989). The District Court also held that the CPUC's regulation of Federal Express was permissible under the Commerce Clause. Petitioners' Appendix C, 723 F. Supp. 1379 (N.D. Cal. 1989). Subsequent reference will be made to these decisions, as they appear

majority rejected the District Court's ruling that the ADA did not serve to preempt the CPUC's authority to regulate Federal Express's transportation of packages exclusively by truck between points in the State. Specifically, the panel majority held that because Federal Express is "an air carrier" for purposes of section 105 of the ADA, all of its intrastate trucking operations, including transportation of packages moving entirely by truck, were beyond the State's regulatory authority.

The panel majority's reasoning makes this case important to State regulators for the following reasons: first, this broad construction of the ADA to preempt State regulation of the substantial intrastate trucking operations of an air carrier such as Federal Express will affect each of the State agencies which economically regulate

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in Petitioners' Appendix, in this form: App. at ____. Section 1305(a)(1) of the ADA appears at Petitioners' Appendix D-3.

intrastate trucking; second, by expanding the preemptive provisions of the ADA beyond the actual air transport operations of Federal Express, the panel majority has placed at risk such traditional State regulatory programs as motor carrier safety, licensing, and insurance regulation. Moreover, as noted by the dissent below, the panel majority's reasoning sanctions preemption of State regulation of business activities which are wholly unrelated to air transport operations.

Accordingly, this case raises important questions, which should be addressed by this Court, concerning the scope of State authority over the operations of "air carriers" under section 105 of the ADA. As the National representative of the State regulatory commissions, the NARUC's interest in addressing these issues is strong,

compelling its participation in this case.[2]

SUMMARY OF ARGUMENT

The Court should grant the Petition for Certiorari and review the Ninth Circuit panel majority's opinion due to the National importance of the issue raised by the Petition: the scope of State regulation of non-air transportation services of air carriers in light of the preemptive provisions of the ADA. Left unreviewed by this Court, the panel majority's decision is an open-ended invitation to any company possessing a Federal air carrier certificate to seek to exempt itself from otherwise applicable State regulation of business activities having little or no relationship to the air transport business. Quite

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[2] Consistent with the Court's Rule 37.1, the NARUC will not repeat the discussion and analysis contained in the Petition for Writ of Certiorari. The NARUC supports those arguments.

simply, this is an important issue which should be resolved.

Furthermore, despite the panel majority's stated willingness to protect State regulation of the safety aspects of Federal Express's operations, there is no principled distinction between those matters that the court found to be preempted (rates, rules, and conditions of service), and those not preempted, such as State regulation and enforcement of carrier safety standards or liability insurance requirements. Clearly, by focussing its preemption analysis on such generic matters as State regulation of "terms of service" which "may affect price," the court has provided a rationale for Federal preemption of virtually all State corporate and economic regulation of the operations of "air carriers," including business activities which have little or nothing to do with the provision of passenger or package air transport services.

The NARUC respectfully submits that the panel majority's decision is so sweeping, so disruptive of State regulatory policies and plans, and so erroneous, that this Court must grant the petition for certiorari in order to reverse the decision below and reinstate the decisions of the District Court which upheld State regulation in the public interest.

ARGUMENT

LEFT UNREVIEWED BY THIS COURT, THE PANEL MAJORITY'S CONSTRUCTION OF THE ADA WILL CAUSE UNWARRANTED HARM TO STATE REGULATORY POLICIES AND PROCEDURES

The issue presented by this case is straightforward: does section 105 of the ADA, 49 U.S.C. App. sec. 1305(a)(1), preempt the State of California from regulating Federal Express Corporation's transportation of packages between points in the State entirely by truck? In other words, does the Airline Deregulation Act, which preempts

State regulation of air transportation, also preempt the CPUC's authority to regulate the intrastate motor carrier transportation of goods which never see the inside of an airplane simply because the trucks are operated by "an air carrier"?

As the CPUC's Petition describes, the panel majority's construction of section 1305(a)(1), is wrong -- as a matter of interpreting of the statutory language on its face, or in light of relevant legislative history, or as a matter of practical consequence. Simply stated, once the panel majority conceded that the statute <u>cannot</u> be read literally to preempt all State regulation which affects the business activities of "an air carrier" such as Federal Express (App. at A-4), there can be no principled construction of section 105 of the ADA to cover, and thereby preempt, some (but not all) aspects of State regulation not directly related to an air carrier's

"air transportation."

In its Petition, the CPUC has ably analyzed the errors in the panel majority's legal reasoning, showing that the court below was far too willing to broadly construe a Federal statute to displace the exercise of police powers reserved by the Constitution to the States. The NARUC endorses this analysis, but seeks to address the practical implications of the Court of Appeals' decision.

I. The Panel Majority's Opinion Threatens State Economic Regulation Nationwide

As this Court has long held, "[i]ntra-state transportation is primarily the concern of the state." <u>North Carolina v. United States</u>, 325 U.S. 507, 511 (1945). Accordingly, the construction and application of Federal statutes which may preempt State regulation of "intra-state transportation" must meet "a high standard of certainty," and the "justification for

the 'exercise of federal power must clearly appear.'" Id., citing Florida v. United States, 282 U.S. 194 (1931). While these cases address the authority of the Interstate Commerce Commission to preempt State economic regulation of rail carriers, the principle they contain -- that Federal courts and agencies must not lightly preempt the authority of the States to exercise their inherent police powers to protect the interests of their citizens -- remains an important principle of "our Federalism."[3]

The panel majority appeared to recognize as much when, in analyzing the impact of section 105(a)(1) of the ADA, it purportedly "[took] into account the

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[3] Or as this Court stated more recently, "[t]he critical question in any preemption analysis is whether Congress intended that federal regulation supersede state law." Louisiana Public Service Commission v. FCC, 476 U.S. 355, 369 (1986). "Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law." Id., at 368 (emphasis added).

presumption against preemption." App. at A-4, citing California v. ARC America Corp., 490 U.S. 93 (1989), and West v. Northwest Airlines, 923 F.2d 657 (9th Cir. 1991). Yet, as noted in the dissent below (App. at A-7-A-12), the panel majority has strained to split hairs, has confused regulatory concepts, and has mischaracterized Federal Express's services in order to escape the "plain language of the statute" (App. at A-11), and thereby render meaningless the long-settled presumption against preemption.[4]

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[4] The panel majority's reasoning evinces little understanding of economic, safety, or any kind of regulation. For example, the panel majority characterizes the decision in Air Transport Ass'n v. Public Util. Comm'n, 833 F.2d 200 (9th Cir. 1987), cert. denied, 487 U.S. 1236 (1988) to be about "non-economic regulation." App. at A-5. Yet, that decision, as the panel majority describes it, involved State regulation of "a general rate for the protection of telephone users" -- a quintessential example of economic regulation which relates to the "services of any air carrier."

In similar fashion, the panel majority's belief that it is State "contract

Unless reviewed and reversed by this Court, the practical consequences of the panel majority's failure to properly construe section 105 of the ADA will be dire not only for the State of California, but also for the other States within the Ninth Circuit, and if followed by other courts, potentially all States that economically regulate intrastate motor carrier operations.

According to the most recent information collected by the NARUC, regulatory bodies in 42 States including California economically regulate intrastate for-hire motor carriers.[5] Under the proper

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and tort" law that survives preemption -- and not "economic" regulation -- is inexplicable. App. at A-6. Clearly, California's "principles of tort and contract" implicate Federal Express's "terms of service" as surely as direct CPUC regulation of the company's intrastate truck-only service. Yet, one is preempted, the other not.

[5] National Association of Regulatory Utility Commissioners, 1990 Annual Report on Utility and Carrier Regulation, (Washington,

reading of section 105 (a) of the ADA, none of these States may exercise jurisdiction over the air transportation services of Federal Express, or any other "air carrier" for that matter. However, the panel majority's erroneous construction of the statute goes beyond "air transportation" to preempt State regulation of all economic aspects of the motor carrier operations of any business able to acquire Federal authority to "provide air transportation."

The practical harm the panel majority's construction of the ADA will cause is readily apparent. As the CPUC describes in its Petition at 12-13, an "air carrier" such as Federal Express which is exempt from State regulation will obtain important competitive advantages over its intrastate trucking competitors. As the CPUC notes, it has devoted great time and effort to developing "pro-competitive, flexible and

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D.C., 1991) at 844-5.

adaptive" regulatory policies which seek to promote market-based intrastate truck services with effective safeguards to anticompetitive conduct. Id. at 12. These policies, and similar initiatives in other States, are placed at risk by the panel majority's ruling.[6] Clearly, this open-ended invitation to evade lawful State regulation must be reviewed and reversed by this Court.

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[6] The panel majority's opinion appears to place some limits on the extent to which the motor carrier operations of an air carrier would be exempt from State regulation. Apparently, Federal Express wins its exemption from CPUC regulation only because the company operates an "integrated transportation system" for which its intrastate truck service is "an essential part." App. at A-7. Presumably, an existing intrastate trucking company in California which happened to own an airplane would be unable to obtain Federal air carrier authority and exempt itself from State regulation for its trucking operations. But as the dissent below describes, any "limits" on the panel majority's reasoning are illusory. App. at A-11. Moreover, the NARUC submits that it is hardly the business of the Federal courts to be undertaking a case-by-case review of the facts of "integratedness" and "essentiality" the panel majority proposes.

II. The Panel Majority's Opinion Threatens State Safety and Insurance Regulation

The panel majority makes much of its conclusion that Federal Express has only challenged the CPUC's "economic" regulation: ". . . it is uncontested in this case that the general traffic laws of California and its safety requirements for trucks on its highways apply to Federal Express. . . ." App. at A-5. Later, however, the panel majority provides some insight concerning its definition of "economic" regulations, i.e. regulations which "bear on price" or "relate to the terms on which the air carrier offers its [intrastate trucking] services." App. at A-6. With due respect, the NARUC submits that rather than limiting the scope of its preemptive construction of the ADA to "economic" matters, the panel majority has hopelessly confused matters, and more seriously, raised the clear possibility that State regulations necessary for the protection of the shipping and

traveling public will also be preempted.

A few examples illustrate the difficulties that the panel majority's opinion creates: if a State determined that health or safety conditions in congested urban areas required that certain types of vehicles not make pick-ups or deliveries during certain hours of the day, its regulation would clearly "relate to the terms" on which Federal Express offers its services if Federal Express operated those vehicles covered by the regulation. Federal Express, and all other similarly situated carriers, might well find that this regulation directly affects the services it offers and the prices it is able to charge. Under the panel majority's reasoning, Federal Express could well be exempt from this State health and safety regulation.

Or consider a traditional State cargo requirement that intrastate carriers provide cargo and liability insurance for the

protection of shippers and the traveling public. Required cargo insurance "relates to the terms on which the air carrier offers it services" and presumably would be preempted under the panel majority's reasoning. However, required liability insurance also "determine[s] cost," which in turn "affect[s] the price" charged to the carrier's customer, and therefore would be preempted, or at least suspect, under section 105 of the ADA. Accordingly, the panel majority's reasoning raises a serious question as to whether or not California, or any other State, can require that Federal Express or other air carriers that conduct trucking operations insure their vehicles and their contents.

Similarly, it is not at all apparent from the panel majority's opinion that the CPUC or any other State "economic" regulatory agency can impose filing, registration, or assessment fees on Federal

Express or other air carriers to support State safety enforcement. Again, since such fees would be factored into carrier costs, in turn "affecting price," they too would be suspect.[7]

The problem here is that once the panel majority found that some of Federal Express's non-air transport activities were covered by section 105 preemption, any principled way to limit the scope of such preemption was lost. Clearly, the panel majority's apparent tests -- that the trucking service be "integrated" or "essential" to the air service, or that the State regulation "determine the cost" or

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[7] The dissent below offered additional, perhaps more fanciful, examples of the problems and uncertainties that the panel majority's opinion raises. App. at A-10 The NARUC is concerned not only that carriers such as Federal Express will deliver pizza and flowers free from State regulation, but also that businesses that are not now "air carriers" will become such in order to exempt themselves from State regulation. Such fears are no less far-fetched than the dissent's concerns.

"affect the price" -- raise more questions than they resolve. However, as the dissent notes, "this is an easy case." App. at A-8. Under section 105 of the ADA, Federal Express's transportation of packages which move by air is beyond State regulatory jurisdiction. Intrastate transportation of goods entirely by truck is not. This rule is simple and intelligible. It should be adopted by this Court following the grant of the Petition and subsequent review of the panel majority's opinion.

CONCLUSION

For the reasons herein stated, the NARUC respectfully requests that the CPUC's Petition for Writ of Certiorari be granted.

Respectfully submitted,

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November 22, 1991

No. 91-502

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

FEDERAL EXPRESS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

Petitioners' supplemental brief urges this Court not to remand the present case for reconsideration in light of this Court's recent decision in *Morales v. Trans World Airlines, Inc.*, No. 90-1604 (June 1, 1992), which held that state laws regulating airline fare advertising were laws "relating to rates, routes, or services of any [federally certificated] air carrier" within the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1). Petitioners are correct that the *Morales* decision in no way calls for reconsideration of the Ninth Circuit ruling applying Section 1305(a)(1) in this case. But petitioners are incorrect when they advance a new (though not newly available) argument urging this Court to grant review. The petition should be denied.

1. Petitioners correctly argue that nothing in the *Morales* decision undermines the Ninth Circuit ruling and that a remand for reconsideration in light of *Morales* is accordingly inappropriate here. Supp. Br. 2-3. As petitioners themselves point out, the particular issue in this case is "distinct from that in *Morales*." Supp. Br. 2, 3. The question here is whether surface transportation that is part of the integrated operations of a federally certificated air carrier is covered by Section 1305(a)(1) (*see* Pet. App. A5); the issue in *Morales* was whether state laws regulating the advertising of airline fares were laws "relating to" the rates, routes, or services of the air carrier. The specific *holding* of *Morales*, therefore, would not alter any aspect of the Ninth Circuit's analysis.

But this conclusion hardly suggests, as petitioners would have it, that *Morales* has no relevance here. On the contrary, that case's reasoning and broad interpretation of Section 1305(a)(1) *reinforce* the Ninth Circuit's ruling. *Morales* held, based on the natural meaning of the text, that Section 1305(a)(1) mandates a broad preemption (any laws "relating to" air carriers' rates, routes, or services) to implement the important deregulatory policies behind the provision. So too, in this case, the Ninth Circuit held that state economic regulation of the surface-transportation component of an integrated service offered by a federally certificated air carrier would "relat[e] to the rates, routes, or services of any air carrier [that is federal certificated]," within the plain meaning of Section 1305(a)(1), and would conflict with Congress's deregulation-based policy of fostering the development of air cargo systems. *See* Br. in Opp. 6-9. The Ninth Circuit ruling in this case is thus strongly supported by both the method of analysis and the construction of Section 1305(a)(1) in *Morales*.

2. Petitioners' supplemental brief also attempts to support review in this case by pointing to a Department of Transportation (DOT) report submitted to Congress, pur-

suant to congressional direction, in September 1990—long before the June 1991 Ninth Circuit decision in this case.[1] Based on spliced-together quotes from the report, petitioners assert that DOT, "addressing the precise issue present in this case, has acknowledged that [petitioners'] argument is correct." Supp. Br. 4. But, as the last-ditch nature of this new (but long-available) argument makes clear, this claim even on its face furnishes no ground for granting certiorari in this case and in any event rests on a misreading of the report.

First, even if the report said what petitioners represent—that "preempting state regulation of 'all surface package express . . . [or] surface transportation movements by air carriers' would '*require* legislation' " (Supp. Br. 4, quoting DOT Report at 53-54, 52 (emphasis added by petitioners)—that view would not conflict with the Ninth Circuit's ruling. The Ninth Circuit did *not* hold that "all" surface transportation offered by an air carrier is covered by Section 1305(a)(1). Rather, the case before the court of appeals, and therefore the court's ruling, deals with surface transportation performed in an integrated system offered by an air carrier. Pet. App. 5. Accordingly, even if the DOT report had expressed the legal view that Section 1305(a)(1) does not currently immunize "all" surface transportation by air carriers from state economic regulation, as petitioners assert, that view would not contradict the Ninth Circuit holding.

Second, contrary to petitioners' claim, the DOT report is not in fact a statement by DOT of its statutory interpretation. The report does not purport to set forth any

[1] In Section 341 of the Department of Transportation and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-164, 103 Stat. 1099 (1989), Congress directed DOT to "study the effect on consumers of State regulation of the rates, routes, and services of the express package industry and make recommendations to Congress." The DOT report is the mandated study.

legal conclusions—much less current views that take account of the Ninth Circuit decision, which post-dates the report. Indeed, the report contains no statutory analysis at all, but discusses only the economic effects of established or attempted state regulation of various aspects of the entire package express industry, which includes bus lines, motor carriers, and freight forwarders, as Congress directed. *See* note 1, *supra*. Thus, the report cannot be read as a statement of DOT's position (allegedly in conflict with the Ninth Circuit ruling) on the proper interpretation of Section 1305(a)(1).

Third, and in any event, nothing in the passages of the DOT report on which petitioners rely, or in any other part of the report, asserts a view of the statute contrary to the Ninth Circuit's. Petitioners rely on two passages. From page 52 of the report they take the "require legislation" quote (Supp. Br. 4) set out above. And they rely on page 53 as a citation for their assertion that "DOT stated that Congress would have to *amend* [Section 1305(a)(1)] to accomplish this objective" [*i.e.*, exempting "all surface transportation" from state economic regulation]. Supp. Br. 4. But petitioners' claim is based on a patent misreading of these passages, which appear in the portion of the report that lists eight "options" for possible congressional action to address the problems with continued state regulation of various aspects of the entire package express industry (not just the air carrier portion). DOT Report at 52-58. *See* Appendix A, *infra* (reprinting this portion of the report).

When the report states, in its introductory paragraph before setting forth the options, that all but two of the options would "require legislation" (Report at 52), it is not asserting that, in DOT's view, the objectives could not be reached without legislation. It is simply stating the obvious, telling Congress that, of the eight options about to be described, six identify potential amendments to legis-

lation.[2] Similarly, when the report identifies the options to "[a]mend" Section 1305(a)(1) in various ways, it is not making any claim that Congress would have to amend the provision to accomplish the goals. It is simply describing what each of these options are—namely, to amend Section 1305(a)(1).

Thus, contrary to petitioners' claim, the relied-on passages of the DOT report do not take the position that Section 1305(a)(1) currently covers only the transportation of packages exclusively by air. Indeed, those passages suggest just the opposite view of the provision. In its statement of the options (Report at 53, 54)—as in DOT's letter of transmittal to Congress (attached to the entire report, lodged with the Clerk of this Court, at p. 2)—DOT pointedly notes that the amendments it is discussing would "clarify" the law (thrown into doubt by the district court ruling in favor of petitioners in this case). The Ninth Circuit ruling in this case, of course, provided just such clarification after the DOT report was submitted to Congress.

3. While the DOT report, therefore, does not indicate any government position on the legal issue contrary to the Ninth Circuit ruling, it does highlight an additional reason why certiorari should be denied. As the report (as well as the legislation that directed DOT to prepare it) makes clear, Congress has under active consideration the entire matter of preemption of state regulation of all surface transportation by trucking companies, air carriers, and others. *See* H.R. 3221, 102d Cong., 1st Sess. (1991) (bill to preempt state regulation of surface transportation provided by *any* "national intermodal carrier," including motor carriers and air carriers), reprinted as

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[2] The introductory paragraph adds that other options, including the remaining two of the eight listed—do nothing, develop a voluntary uniform state code—"would not require legislation." Report at 52.

Appendix B, *infra*. That fact—together with the absence of any lower court conflict and the correctness of the Ninth Circuit ruling, *see* Br. in Opp. 6-14)—makes unnecessary and inappropriate any review by this Court of the present case.

Respectfully submitted,

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APPENDICES

APPENDIX A

Excerpt from
U.S. Department of Transportation,
Report to Congress: Impact of State Regulation on the Package Express Industry
(Sept. 1990)

VIII. OPTIONS FOR CONGRESSIONAL ACTION

Eight options have been identified for possible action. All eexcept options 1 and 2, require legislation. Other actions which would not require legislation were investigated, but would not assure resolution of the problems addressed above.

Note that as we proceed from Option 3 through Option 8, benefits increase, but so does the scope of change to existing competitive conditions in surface transportation.

OPTION 1: *Do Nothing*

Under this option the states would continue to impose a regulatory burden upon carriers and shippers. Carriers will continue to incur unnecessary costs, which would be passed on to customers in the form of higher than necessary rates and limitations upon service options for shippers.

Pro:

1. Would prevent pressure from state regulatory agencies to keep control of intrastate traffic.

2. Would require no expenditure of federal resources.

Con:

1. Would permit the states to continue to erode the benefits achieved by federal motor carrier and air cargo reform, thus burdening shippers and carriers with higher costs and inefficient operations.

OPTION 2: *Develop A Voluntary Uniform State Code For Regulating Package Express Carriers*

Develop a uniform code for regulation modeled after the federal Motor Carrier Act of 1980, and make a concerted effort to have it adopted voluntarily by the states which exercise economic regulation of trucks and buses.

Pro:

1. Would obviate the need for federal legislation to preempt state regulation of package express carriers.
2. If adopted by all or most of the states and administered as the ICC has administered the MCA, it would permit carriers to conduct surface operations instead of air operations whenever they wished, and maintain their respective uniform national prices and policies.

Con:

1. Based on an attempt by NARUC in the early 1980's to get the states to adopt a uniform model code for state regulation of trucking in general, the chances are slight that all—or even most—states would voluntarily adopt such a code.
2. Even if most states were to adopt the code, there would continue to be differences in the administration of the regulations from state to state, thus diluting the benefits.
3. A great deal of time and effort would have to be devoted to developing the code and getting it ratified by NARUC, then persuading the states to adopt it, and monitoring progress toward uniformity of regulation. A previous effort by a NARUC subcommittee developed a uniform Motor Carrier Code and got it ratified unanimously by NARUC, but not a single state adopted it.

OPTION 3: *Exempt Surface Package Express Movements By Air Carriers*

Amend the Federal Aviation Act of 1958 (Section 1305 (a)(1) of Title 49 United States Code) to clarify that all package express service provided within a single state by "air carriers" would be exempt from state regulation, regardless of whether the movement was performed by air or surface transportation.

Pro:

1. Would address the problem with greater certainty than Option 2.
2. Would allow air carriers to achieve cost savings, which would exert downward pressure on rates. It would also encourage improvements in services offered to shippers.
3. Would enhance air carriers' operating flexibility and their ability to respond promptly to the demands of the marketplace.

Con:

1. Exempting only air carriers' surface operations from intrastate motor carrier regulation would place all other types of carriers that provide intrastate express package service at a competitive disadvantage.
2. Some states may object to this exemption, because they have an interest in regulating motor carrier transportation of property that occurs wholly within their boundaries.

OPTION 4: *Exempt All Surface Transportation Movements By Air Carriers*

Amend the Federal Aviation Act of 1958 (Section 1305 (a)(1) of Title 49 United States Code) to clarify that all transportation provided within a single state by "air

carriers" would be exempt from state regulation, regardless of whether the movement was performed by air or surface transportation.

Pro:

1. This amendment has a broader scope than Option 3, and hence would provide broader benefits.
2. Would allow air carriers to achieve cost savings, which would exert downward pressure on rates. It would also encourage improvements in service offered to shippers.
3. Would enhance carriers' operating flexibility and their ability to respond promptly to the demands of the marketplace.

Con:

1. Exempting only air carriers' surface operations from intrastate motor carrier regulation would place all other types of carriers that provide intrastate trucking service at a competitive disadvantage.
2. Some states may object to this exemption, because they have an interest in regulating motor carrier transportation of property that occurs wholly within their boundaries.

OPTION 5: *Exempt All Package Express Movements*

Amend the Interstate Commerce Act to provide that package express service would be exempt from state economic regulation so long as it constituted surface transportation performed by an interstate air or motor carrier.

Pro:

1. Provides an evenhanded approach: all competitors, including air carriers, bus, and trucking companies, would benefit.

2. Would allow carriers to achieve cost savings, which would exert downward pressure on rates. It would also encourage improvements in services offered to shippers.

3. Would enhance carriers' operating flexibility and their ability to respond promptly to the demands of the marketplace.

Con:

1. Some states and particularly state regulatory agencies may object to this amendment, because it would infringe upon their right to regulate commerce occurring wholly within their boundaries. Such states are likely to protest that this amendment is effectively a partial deregulation of the motor carrier industry under a different name.

OPTION 6: *Exempt All Motor Carrier Transportation Of Freight*

Amend titles 23 or 49, United States Code, to provide that all transportation of freight would be exempt from state economic regulation so long as it constituted surface transportation performed by an interstate motor carrier.

This change may be accomplished by the enactment of H.R. 4261 (the Hastert bill). The bill would preempt state economic regulation of the intrastate operations of interstate motor carriers and brokers. In addition, it would provide for greater uniformity in state truck registration and taxation procedures. While each state would remain able to set its own tax *rates*, the administrative burden on carriers of complying with taxation and vehicle registration requirements would be greatly reduced. It has been estimated that the regulatory and administrative burdens on motor carriers together amount to $4-6 billion per year.

Pro:

1. Provides a relatively even-handed approach: all competitors, with the possible exception of bus companies, would benefit.

2. Avoids definitional disputes over what constitutes "express package transportation."

3. Allows carriers to achieve cost savings, which would exert downward pressure on rates. It would also encourage improvements in services offered to shippers.

4. Would enhance carriers' operating flexibility and their ability to respond promptly to the demands of the marketplace.

5. Would promote competition in the trucking industry as a whole, as well as in the package express industry.

Con:

1. Some states and state regulatory agencies might object to this amendment, because it infringes upon their right to regulate commerce occurring wholly within their boundaries. Such states are likely to protest that this amendment is effectively a partial deregulation of the motor carrier industry under a different name.

2. It is possible that, if not specifically amended, the Hastert bill would not free bus package express movements from state regulation, because they may not be legally construed as "property."

OPTION 7: *Deregulate The Trucking Industry*

Amend Title 49, United States Code, to eliminate all remaining federal economic regulation over transportation of motor freight, and also exempt it from state economic regulation so long as it constituted surface transportation performed by an interstate motor carrier.

This change would be similar to that proposed in the Reagan Administration's 1987 truck deregulation bill.

Pro:

1. Encompasses a broad range of movements of motor carrier transportation of property, including the package express industry.
2. Would result in additional benefits and efficiencies over and above those of Options 3 through 6.
3. Would deregulate the motor carrier industry and promote competition, not only in the package express industry, but in the motor carrier industry as a whole.

Con:

1. Some states might object to this amendment because it infringes upon their right to regulate commerce wholly within their boundaries.
2. Is broader in scope than the specific problem to be addressed.

OPTION 8: *Sunset The ICC*

Amend subtitle IV of title 49, United States Code, to eliminate economic regulation of motor carriers and interstate water carriers, to transfer rail regulation to DOT, and to sunset the ICC.

These changes could be effected by enactment of H.R. 2211. This bill would eliminate all ICC regulation of the following: trucking; intercity buses; household goods freight forwarders; brokers; pipelines (other than water, gas, or oil); interstate water carriers; interstate rail passenger carriers; and ferries. The state preemption provision would eliminate all state economic regulation of the above segments of the transportation industry.

This is the broadest of all the options addressing state economic regulation of freight transportation, including the express package industry.

Pro:

1. Would result in additional benefits over and above those of Options 3 through 7.
2. Would foster competition in the U.S. transportation system to a greater degree than the other options.
3. Would help make the U.S. more competitive in international markets than would the other options.

Con:

1. Much broader in scope than the problem at hand.
2. Similar bills have had little success in prior sessions of Congress. Hence, it may not be the most promising vehicle for removing state economic regulation of the express package industry.
3. It is possible that, if not specifically amended, H.R. 2211 would not free bus package express movements from state regulation, because they may not be legally construed as "property."

IX. RECOMMENDATIONS

Of the eight options considered, four appear to be inadequate and four are worthy of further consideration. Option 1 (do nothing) does not address what we perceive to be a very real problem. Option 2 (model code) would likely not produce uniformity in this century. This approach did not work well in a similar situation involving trucking regulation, and we see no reason why it would work any better this time. Options 3 and 4 deal only with air carriers. These options would be inequitable to other package express carriers, as well as bad economics.

However, we believe that Options 5-8 deserve serious consideration:

- Option 5 would prohibit the states from imposing economic regulation on package express traffic within their borders. This approach zeroes in on the problem at hand, without addressing broader, related goals (e.g., economic deregulation of *all* motor carriers).

- Option 6 would prohibit the states from regulating *any* motor carrier traffic within their borders. This approach would create a truly level playing field for motor carriers, as well as producing better economic efficiency than Option 5.

- Option 7 would deregulate trucking at both the federal and state levels. This would be very helpful to the efficiency of the U.S. trucking industry, would provide broader benefits to shippers, and would help U.S. industry deal with the issue of international competitiveness. This will be even more important, after the deregulatory reforms of the European Economic Community are put in place in 1992. However, such legislation would be much broader in scope than the minimum "quick fix" needed to address the problem faced by package express carriers.

- Option 8 would sunset the Interstate Commerce Commission and transfer rail regulation to the Department of Transportation. We believe that this legislation would provide very valuable benefits in terms of economic efficiency and international competitiveness. It should be enacted on its own merits. However, its scope far exceeds what is needed to address the problems of package express carriers.

Options 5 through 8 are of sufficiently broad scope to address the problems noted in this study. The Administration has previously submitted legislation that would implement Option 7 and Option 8, as well as providing other

benefits. We believe that these legislative proposals should be enacted on their merits. However, if the Congress prefers a more narrowly focused approach, we believe that Option 5 (prohibit the states from regulating package express traffic within their borders) and Option 6 (prohibit the states from regulating all trucking within their borders) provide the minimum scope of legislative change necessary to solve the problems.

APPENDIX B

102D CONGRESS
1ST SESSION

H.R. 3221

To preempt State laws relating to the regulation of rates for surface transportation of property services provided by certain motor and air carriers

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IN THE HOUSE OF REPRESENTATIVES

AUGUST 2, 1991

Mr. CLEMENT (for himself and Mr. UPTON) introduced the following bill; which was referred to the Committee on Public Works and Transportation

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A BILL

To preempt State laws relating to the regulation of rates for surface transportation of property services provided by certain motor and air carriers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Intermodal Carriers Competitiveness Act of 1991"

SEC. 2. FINDINGS.

Congress finds that—

(1) computers and telecommunications have made possible an international economy that demands more sophisticated transportation of goods and information;

(2) businesses need rapid transmission of information, dependable delivery of goods, and a wide variety of transportation options;

(3) the express package industry uniquely meets the logistic needs of customers ranging from large multinational corporations to small domestic mail order firms and has provided enormous economic benefit to United States shippers and consumers; and

(4) State economic regulation of the express package industry costs the United States economy an estimated $6,000,000,000 to $8,000,000,000 annually.

SEC. 3. STATE REQUIREMENTS FOR INTERSTATE INTERMODAL CARRIERS.

No State or political subdivision thereof, and no interstate agency of 2 or more States, shall adopt or enforce any law, rule, regulation, standard, or other provision having the force or effect of law relating to interstate or intrastate rates, routes, services, or terms of service of any national intermodal carrier with respect to the provision of surface transportation of property in the State.

SEC. 4. NATIONAL INTERMODAL CARRIER DEFINED.

For purposes of this Act, the term "national intermodal carrier" means—

(1) a motor carrier—

(A) which provides transportation of property in interstate commerce; and

(B) which provides, by itself, or jointly with a company affiliated through common ownership, a national interstate intermodal air-ground transportation service; and

(2) an air carrier which provides transportation described in paragraph (1)(A) and a service described in paragraph (1)(D) of property.